UNIVERSIDAD PABLO DE OLAVIDE, SEVILLA

TESIS POR COMPENDIO

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¨Hacia una visión crítica y práctica de la eficacia de las instancias e intervenciones internacionales de los derechos humanos en las Américas: Una reevaluación del sistema interamericano y las comisiones de la verdad en las transiciones¨

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TEXTO PARA ACOMPAÑAR LOS ARTÍCULOS/CAPÍTULOS

Nota introductoria: Explicación de la organización de la presentación

El artículo 34 de la Normativa sobre Estudios de Doctorado de la Universidad Pablo de Olavide, Sevilla, explica que la tesis por compendio "deberá ser un documento con unidad temática estructurado, como mínimo, por los siguientes puntos:

I. Introducción en la que se justifique la unidad temática de la tesis.

II. Objetivos a alcanzar, indicando en qué publicación o publicaciones se abordan.

III. Marco Teórico en el que se encuadra el conjunto de publicaciones.

IV. Las publicaciones aportadas en formato de documento de trabajo.

V. Discusión y Conclusiones generales.

VI. Otras aportaciones científicas derivadas directamente de la tesis doctoral."[1]

Además, el artículo 34(5)(b) exige que la tesis por compendio también incluya un "Informe de los indicios de calidad de las contribuciones presentadas y, en su caso, con el factor de impacto y cuartil del Journal Citation Reports (SCI y/o SSCI) o de las bases de datos de referencia del área en el que se encuentren las publicaciones presentadas." También exige la inclusión de "Copia completa de las publicaciones, ya sean publicadas o aceptadas".

[1] Ver, Normativa Sobre Estudios Oficiales de Doctorado, Universidad Pablo de Olavide de Sevilla (publicada en 29 de noviembre de 2012).

Para facilitar la lectura, se ha organizado la presentación de la siguiente manera:

1. Introducción (en la que se justifique **la unidad temática** de la tesis) (I, arriba)
2. Objetivos a alcanzar, indicando en qué **publicación o publicaciones** se abordan (II, arriba)
3. **Marco Teórico** en el que se encuadra el conjunto de publicaciones, Discusión y Conclusiones generales (III y V, arriba)
4. **Otras aportaciones científicas** derivadas directamente de la tesis doctoral (VI, arriba), junto con lo exigido en el artículo 34(5)(b), es decir:
    - "Informe de los **indicios de calidad** de las contribuciones presentadas y, en su caso, con el factor de impacto y cuartil del **Journal Citation Reports (SCI y/o SSCI)** o de las bases de datos de referencia del área en el que se encuentren las publicaciones presentadas."
    - En este último, he optado por incluir una breve síntesis de algunas de las referencias más importantes o representativas de algunos de los textos aquí incluidos, así como cifras del número de citas en revistas y publicaciones académicas.

EN ANEXO: Las publicaciones presentadas en formato de documento de trabajo. (IV, arriba). Se incluye versiones editadas de las publicaciones en español, junto con las versiones completas en inglés o, en el caso de un artículo, en español. Se incluye junto con este documento todas las versiones en español. Después, se adjunta copias en versión de *reprints* de los artículos o capítulos ya publicados. (artículo 34(5)).

1. Introducción en la que se justifique la unidad temática de la tesis.

Esta tesis por compendio presenta un conjunto de artículos y capítulos de libros ya publicados que cuestionan la eficacia de desarrollar los derechos humanos dentro del ámbito puramente jurídico. En particular, la tesis recoge las características principales de los modelos dominantes en el área de derechos humanos, y cuestiona la capacidad de estos modelos para lograr una verdadera emancipación popular en las Américas. Los artículos defienden un modelo más complejo, en el cual los instrumentos de derechos humanos sirven como una herramienta, entre varias, y enfatizan la necesidad de estudiar de forma empírica, las consecuencias reales, inclusive las consecuencias negativas no deseadas, de los desarrollos jurídicos de los derechos humanos, especialmente cuando estos siguen jurídicos y descontextualizados. El proyecto se encuadra dentro de un marco teórico que enfatiza que los derechos humanos se deben comprender como un espacio de lucha y no sólo una cuestión jurídica. Aprovecha los aportes críticos de Joaquín Herrera, quien exige que los "derechos humanos deben ser estudiados y llevados a la práctica, primero, desde un saber crítico que desvele las elecciones y conflictos de intereses que se hallan detrás de todo debate preñado de ideología, y, segundo, insertándolos en los contextos sociales, culturales y políticos en que necesariamente nacen, se reproducen y se transforman."[2] También, y de manera relacionada, cuestiona las prácticas que encaran a los derechos humanos como tema exclusivamente jurídico cuya realización sería posible a través de determinaciones y decisiones tomadas desde "arriba".

[2] HERRERA FLORES, J., "Hacia una visión compleja de los derechos humanos,"en HERRERA FLORES, J., HINKELAMMERT, F.J., SÁNCHEZ RUBIO, D. & GUTIÉRREZ, G., El Vuelo de Anteo: Derechos Humanos y Crítica de la Razón Liberal (Editorial Desclée de Brouwer, 2000), pág. 24.

Los artículos parten de ese reconocimiento, de forma implícita, y pasan a emplear el trabajo de analistas jurídicos de la sociología del derecho. Específicamente, incorporan algunos elementos de las críticas al movimiento de los derechos humanos planteados por el profesor de la facultad de derecho de la Universidad de Harvard, David Kennedy. Aceptan la crítica de Kennedy en lo que se refiere al enfoque excesivamente jurídico de una buena parte del movimiento de los derechos humanos. También aprovechan el consejo de Kennedy de que hay que entender las acciones de los derechos humanos como intervenciones a las cuales es menester aplicar un análisis de costos y beneficios. Finalmente, algunos de los textos desarrollan esta evaluación pragmática (de costos y beneficios) a partir del reconocimiento que la comunidad internacional tiende a aplicar los 'guiones' ya establecidos independientemente de su eficacia en determinadas situaciones. Esta teoría de aculturación ha sido desarrollada por los profesores estadounidenses Ryan Goodman y Derek Jinks, quienes han aplicado los principios de la misma a las relaciones internacionales en los derechos humanos.[3]

Los artículos y capítulos aquí reconocen que los derechos humanos, a nivel de concepto, han logrado conquistar una cierta legitimidad en las relaciones internacionales, en el discurso político y hasta en la opinión pública de muchos países. Sin embargo, los derechos humanos siguen siendo ideas o proyectos que sólo adquieren relevancia y contenido en la medida que los ciudadanos y ciudadanas, las organizaciones de la sociedad civil y los movimientos sociales los conquisten en la práctica. El proyecto pretende apoyar esta visión crítica a través de estudios que se enfocan en dos temas: A) el sistema interamericano y las

[3] Ver, GOODMAN, R y JINKS, D., Socializing States: Promoting Human Rights Through International Law, Oxford, 2013.

presiones e intervenciones de la comunidad internacional y su eficacia; y B) la justicia transicional y las comisiones de la verdad, también en las Américas. Todos los textos abordan el tema de la relevancia de las instancias internacionales desde una perspectiva que reconoce el potencial de los mecanismos internacionales de protección a los derechos humanos así como los peligros inherentes en la fe ciega en conceptos vagos como "la comunidad internacional" y "los derechos humanos." Los textos buscan problematizar el tema de los derechos humanos en las Américas a través del análisis empírico de la eficacia de distintas intervenciones en el sistema interamericano y en las comisiones de la verdad en los procesos transicionales.

2. Objetivos a alcanzar, indicando en qué publicación o publicaciones se abordan

Técnicamente, la tesis incluye ***cinco*** publicaciones, dos de las cuales han sido publicadas en revistas que constan en el *Journal Citation Review, Social Science Citation Index* (JCR, SSCI). Como contexto (*'background'*), se incluye dos publicaciones adicionales, una de las cuales consta en el JCR/SSCI. Las cinco publicaciones se dividen en dos grupos. El primer grupo se enfoca en el sistema interamericano y las presiones de la comunidad internacional sobre agentes responsables por violaciones a los derechos humanos en las Américas. El segundo, se enfoca en las comisiones de la verdad en los procesos de transición. Los artículos se presentan en la lista que sigue:

A. El régimen internacional de supervisión de los derechos humanos, y su eficacia, con enfoque en el sistema interamericano:

Sobre el régimen internacional de supervisión de los derechos humanos, y su eficacia, con enfoque en el sistema interamericano:

- James L. Cavallaro and Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: the Case of the Inter-American Court" *American Journal of International Law,* Volúmen 102 (2008) (JCR-SSCI)

- James L. Cavallaro and Stephanie Erin Brewer, "Never Again?: The Legacy of the Argentine and Chilean Dictatorships for the Global Human Rights Regime," *Journal of Interdisciplinary History* Volúmen 39 (2008) (JCR-SSCI)

- James L. Cavallaro and Stephanie Erin Brewer, "James L. Cavallaro y Stephanie Erin Brewer, "La función del litigio interamericano en la promoción de la justicia social," *Revista Sur,* Volúmen 8, página 85 (2008)

B. La justicia transicional y las comisiones de la verdad:

Sobre la justicia transicional y las comisiones de la verdad, se presenta los siguientes textos:

- James L. Cavallaro and Sebastián Albuja, “The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond,” en K.McEvoy and L. McGregor (editores) *Transitional Justice From Below* (Hart-Oxford) (2008).

- James L. Cavallaro, “Looking Backward to Address the Future?: Transitional Justice, Rising Crime and Nation-Building,” *Maine Law Review*, Volúmen 60, (2008)

C. Textos Adicionales: Contexto (trasfondo) de los debates

Para explicar el contexto de estos artículos, se pretende incluir selecciones de los siguientes textos:

- James L. Cavallaro and Emily Schaffer, "Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas," *Hastings Law Journal*, Volúmen 56, (2004) (JCR-SSCI)

- James L. Cavallaro and Emily Schaffer, "Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change," *New York University Journal of International Law and Politics,* Volúmen 39 (2006)

Se observa que, para facilitar la lectura, los artículos de contexto/trasfondo están colocados *antes* de los artículos y capítulos con constituyen los documentos de la tesis por compendio, aunque no forman parte del conjunto exigido por el artículo 34 y aquí presentados como parte (c).

3. **Marco teórico en el que se encuadra el conjunto de publicaciones, discusión y conclusiones:** *una visión crítica de la eficacia de los mecanismos internacionales de protección a los derechos humanos*

Las atrocidades de la segunda guerra mundial llevaron una buena parte de los grandes pensadores legales y políticos a exigir un nuevo orden global basado en los derechos humanos. El tamaño e intensidad de las masacres y el fracaso patente del orden global existente en su intento de detener el nazismo y el fascismo, entre otros factores, sirvieron para alentar la esperanza de que sería posible construir este nuevo orden en la práctica. El propio Franklin Delano Roosevelt, quien, hasta 1944 fue presidente de los Estados Unidos, , país que asumiría el liderazgo del mundo post-guerra, prometía que la lucha de los aliados buscaba garantizar las cuatro libertades (‘*four freedoms.*’) Evidentemente, hay que leer esa promesa con un cierto grado de escepticismo, ya que proviene del jefe de estado de un país con fuertes contradicciones en lo que se refería a la cuestión de los derechos humanos y específicamente, continuaba negando los mismos derechos a sus propios ciudadanos negros de forma brutal, y mantenía su papel de fuerza imperial con respecto a las Américas. Sin embargo, había mucha esperanza de que la Organización de la Naciones Unidas pudiera ser un espacio importante para el desarrollo de los derechos humanos, así como un foro capaz de ejercer control sobre los países de tal forma que se pudiera limitar abusos similares a los de las décadas de 1930 y 1940. La Declaración Universal de los Derechos Humanos de 10 de diciembre de 1948 sirvió para alentar aún más estas esperanzas.

Con los años, a pesar de la promesa inicial de un nuevo orden mundial basado en los derechos humanos, la batalla entre los Estados Unidos y la Unión Soviética de la guerra fría relegó los derechos humanos a un segundo o tercer plano. Hubo un choque fundamental entre la visión y preferencia de los Estados Unidos por los derechos civiles y políticos y la visión y preferencia de la Unión Soviética por los derechos económicos, sociales y culturales. Aún dentro del campo de los derechos civiles y políticos, las pésimas condiciones de la población negra en los Estados Unidos, los frecuentes linchamientos, la existencia de leyes abiertamente racistas (las leyes *Jim Crow*), y la negación del derecho al voto para la inmensa mayoría de los ciudadanos negros hizo que los Estados Unidos no permitiera que los mecanismos de supervisión de la ONU tuvieran eficacia. Debido a las presiones ejercidas por los Estados Unidos, pocos años después de su formación, la Comisión de Derechos Humanos, tras haber recibido centenas de solicitudes sobre peticiones concretas, decidió que no tenía competencia para actuar en asuntos concretos. De esa manera, por decisión propia, la Comisión de Derechos Humanos de la ONU se convirtió en una entidad inoperante. La profesora Carol Anderson en sus estudios en los últimos años ha mostrado los extremos hasta los cuales el gobierno de los Estados Unidos estaba dispuesto a llegar para asegurar que los mecanismos de la ONU no tuvieran ninguna posibilidad de investigar la violación masiva de los derechos humanos de la población negra de Estados Unidos. Para mantener la coalición con los llamados '*Dixiecrats*', es decir, Demócratas de la región sudeste de los Estados Unidos, región en la cual la segregación, los linchamientos y la denegación a los derechos al voto y a la educación era más visible, John Foster Dulles, entonces secretario de estado de los EEUU, defendía varios artificios, como el lenguaje

sobre la cláusula de la 'jurisdicción interna' para incapacitar los mecanismos de supervisión de derechos humanos de la ONU.[4]

El giro hacia el desarrollo de normas

Frente a esta realidad, el movimiento de los derechos humanos hizo un giro hacia el proceso de desarrollar normas jurídicas. Durante décadas, la mayor parte de los expertos internacionales de derechos humanos se enfocaban en el desarrollo de las normas. Fue así que varias declaraciones y después tratados sobre asuntos en esta materia se elaboraron. Es justamente entre las décadas de los 1950 y los 1970 que los tratados más importantes de la ONU y también del sistema europeo e interamericano se elaboran. Estos incluyen no sólo los dos pactos universales de la ONU (sobre derechos civiles y políticos y derechos económicos, sociales y culturales), sino también la Convención Europea de Derechos Humanos y la Convención Americana sobre Derechos Humanos. En una segunda fase, ya establecidas las entidades de interpretación y, en ciertos casos, supervisión, el enfoque en el desarrollo de las normas se traslada hacia la jurisprudencia. Durante esta segunda fase se puede identificar un énfasis en desarrollar las normas por medio de interpretaciones novedosas de los instrumentos internacionales de derechos humanos. Sin embargo, tal desarrollo de las normas, que propone expandirlas de manera progresiva, frecuentemente se da como un fin en sí mismo y no logra articularse como un medio para promover el avance de los derechos humanos en términos prácticos. Si bien es cierto que el desarrollo de los tratados ha sido fundamental, también lo es que los tratados por sí solos, y aún con

[4] ANDERSON, C. "A 'Hollow Mockery': African Americans, White Supremacy, and the Development of Human Rights in the United States," en Soohoo, C., Albisa, C. y Davis, M. *Bringing Human Rights Home: A History of Human Rights in the United States.* University of Pennsylvania Press, Philadelphia, 2007.

mecanismos de supervisión, no pueden garantizar la protección eficaz de los derechos humanos. Las normas, sí, son importantes. También son esenciales los mecanismos de supervisión, fiscalización y protección de los derechos humanos. Pero hace falta entender cómo interaccionan estos mecanismos en situaciones concretas.

El teórico David Kennedy, profesor en la facultad de derechos de la universidad de Harvard, ha levantado una serie de críticas profundas al movimiento de los derechos humanos. En particular, sus críticas apuntan al movimiento de derechos humanos cuyas bases están en las grandes metrópolis occidentales. En un artículo publicado tanto en el *European Journal of International Law* como en el *Harvard Journal of Human Rights,* Kennedy sugiere—por lo menos—que el movimiento de los derechos humanos podría ser parte del problema, más que que parte de la solución en lo que se refiere a la emancipación popular.[5] Kennedy cuestiona el estatus del movimiento de los derechos humanos como un objeto de devoción, o vaca sagrada, y llama a resistir la tentación de descartar preocupaciones pragmáticas y "tratar los derechos humanos como objeto de devoción y no de cálculo."[6]

Tal vez la contribución más importante del artículo de Kennedy es la propuesta de que las intervenciones en los derechos humanos deben ser evaluadas de forma pragmática y no se debe presumir su eficacia exclusivamente en función de sus buenas intenciones. Es decir, Kennedy cuestiona abiertamente la práctica de muchos profesionales en el área de

[5] KENNEDY, D., "The International Human Rights Movement: Part of the Problem?", Harvard Human Rights Journal, Vol. 15, pág. 101.
[6] Ibid., página 102. La frase en el inglés original es: "But it is often tempting (for those within and without the movement) to set pragmatic concerns aside, to treat human rights as an object of devotion rather than calculation."

presumir que el reconocimiento de más derechos humanos o de derechos más amplios necesariamente lleva a más emancipación.

Aunque algunas de las críticas planteadas por Kennedy sean cuestionables (hecho que él mismo reconoce al clasificar el listado de problemas potenciales como hipótesis), comparto su visión crítica, en la que llama a no presumir, de manera casi ciega, que toda intervención hecha en el nombre de los derechos humanos es válida. Creo, y he argumentado en varios momentos, que las intervenciones en los derechos humanos deben ser entendidas como cualquier otra intervención de naturaleza política. Es decir, no hay ninguna garantía de que las buenas intenciones lleven necesariamente a resultados positivos. Esa lección—tan evidente en otros temas políticos—suele ser olvidada o minimizada cuando se trata de los derechos humanos. Las críticas planteadas por Kennedy se cuadran con las de Joaquín Herrera, quién insta a los que trabajamos en los derechos humanos a valorar y analizar el contexto político, social, económico y cultural en el cual se lucha por los derechos humanos.

El segundo elemento fundamental del marco teórico que adopto en los textos en esta tesis por compendio se refiere a la naturaleza de los derechos humanos como tema y como área de actuación. ¿Se debe entender el tema de los derechos humanos como área jurídica? ¿o forma también parte del área de las relaciones internacionales, capaz de ser analizado, desarrollado y perfeccionado a través de las intervenciones de juristas y estadistas? ¿O hay, más bien, que entender los derechos humanos como cuestión ligada directamente a la política local? Es decir, ¿hay que entender los derechos humanos en términos puramente

legales, o se puede también aprehenderlos como resultado de la correlación de fuerzas de los distintos sectores de la sociedad, como resultado de las luchas de los movimientos sociales, pueblos, organizaciones, sociedad civil, etc.? Es evidente que no se puede extirpar al tema de derechos humanos de su entorno real, que es el contexto político y social. Es dentro de este contexto que toda iniciativa para avanzar en una determinada situación de derechos humanos debe ser evaluada. Así, entonces, se destaca el segundo elemento fundamental del marco teórico en el cual se sitúa esta tesis: la necesidad de entender este contexto, así como las acciones de los movimientos sociales, de la sociedad civil, de los gobiernos y de los medios de comunicación. Y, más aún, es urgente que incluso al analizar hasta cuestiones que parecen ser puramente jurídicas se tenga en cuenta las estructuras políticas existentes y la interacción de fuerzas políticas, así como las capacidades de los movimientos sociales. Esta tesis propone que ese análisis conduce a reconocer los límites inherentes en los mecanismos de protección a los derechos humanos.

El teórico Joaquín Herrera Flores enfatiza la necesidad de entender los derechos humanos no como algo puramente jurídico y estéril, sino como producto de los conflictos sociales inherentes en la condición humana. El profesor Manuel Gándara resume así este enfoque, citando al proprio Herrera Flores, quien:

> vincula los derechos con los procesos de lucha popular en la búsqueda por hacer posible los diversos proyectos de vida desde las particularidades y diferencias de cada contexto cultural e histórico. Así, para este autor, "los derechos humanos son el resultado de luchas sociales y colectivas que tienden a la construcción de espacios sociales, económicos, políticos y jurídicos que permitan el empoderamiento de todas y todos para

poder luchar plural y diferenciadamente por una vida digna de ser vivida".[7]

El reconocimiento de que los derechos humanos en su realidad e implementación no fluyen de la buena voluntad del legislador, sino de las luchas sociales, es la base de los artículos y capítulos de esta tesis por compendio. Lo que buscan todos los textos aquí presentados es evaluar la eficacia real de medidas y estructuras de índole internacional, que frecuentemente se presumen eficaces gracias a un análisis puramente jurídico. La evaluación que se propone aquí es un análisis empírico fundamentado en el reconocimiento que quienes constituyen el motor para hacer de los derechos humanos una realidad práctica son los pueblos, las organizaciones sociales y los movimientos de derechos humanos.

Como escribe Herrera Flores, hay que tener presente:

> [l]a enorme responsabilidad del jurista crítico, sobre todo, a la hora de exponer a todos lo que el derecho puede y no puede hacer, dadas sus estrechas vinculaciones con los contextos materiales hegemónicos. Hay que conocer los límites de un instrumento para saber, sobre todo en momentos de crisis, cómo usarlo convenientemente y cómo complementarlo con otros formas de lucha para el acceso al bien.[8]

Como enfatizamos (este autor junto con Stephanie Erin Brewer) en uno de los textos aquí presentados, en la práctica del litigio internacional de los derechos humanos, hay que reconocer los límites del papel del jurista y entender el papel fundamental de los

[7] GÁNDARA CARBALLIDO, M., Reseña La Reinvención de los Derechos Humanos por Joaquín Herrera, Revista de Derechos Humanos y Estudios Sociales, disponible en: http://www.uaslp.mx/Spanish/Academicas/FD/REDHES/Documents/Redhes4-09.pdf (citando HERRERA FLORES, J., La Reinvención de los Derechos Humanos, 2007).

[8] HERRERA FLORES, J., Cultura y derechos humanos: la construcción de espacios culturales" en Revista Científica de Información y Comunicación. N° 5, 2008. pp. 54-55.

movimientos sociales en el avance de la implementación de los mismos derechos. En ese artículo, planteamos:

> … En vez de depender del litigio como el principal medio para avanzar en una agenda determinada de derechos humanos, entendemos que los activistas de derechos humanos deben reconocer y sostener el papel clave que desempeñan los movimientos sociales, la sociedad civil y los medios de comunicación en el desarrollo de campañas en pos de la justicia social.[9]

En función del reconocimiento del papel secundario del litigio en las luchas por la justicia social, enfatizamos la necesidad de que los abogados diseñen sus estrategias de promoción y protección de los derechos humanos de forma auxiliar, es decir, como respaldo a las acciones de los movimientos sociales y no al revés. De no ser así, las y los abogados corremos el riesgo de avanzar en la esfera puramente jurídica sin reconocer que tal avance puede, de hecho, constituir un retroceso en términos políticos. Es decir, la intervención en un texto o mecanismo de los derechos humanos que aumenta la amplitud jurídica no necesariamente se traduce en una expansión de los derechos en la práctica y puede llevar a retrocesos en la realidad práctica . En el artículo en la Revista Sur, sostenemos que:

> los abogados de derechos humanos a menudo asumen que el litigio debería conducir la estrategia de incidencia y que los otros elementos arriba citados deben apoyarlo. Nosotros afirmamos que lo verdadero es lo opuesto. Esto es, campañas de incidencia más amplias pueden incluir el litigio ante el sistema interamericano como algo apropiado; pero elegir el litigio internacional, como regla general, no debería imponer límites a otras formas de promover

[9] CAVALLARO, J.L. y BREWER, S.E., "James L. Cavallaro y Stephanie Erin Brewer, "La función del litigio interamericano en la promoción de la justicia social," *Revista Sur,* Volúmen 8, página 85 (2008) (pág. 87).

> la justicia social. Las estrategias de incidencia en pos de la justicia social, no obstante, sí pueden limitar o modificar los métodos de litigio.[10]

Un ejemplo particularmente terrible de las Américas ilustra la importancia de esta constatación: el uso masivo de las desapariciones forzadas en la Argentina. Margaret Keck y Kathryn Sikkink analizan las graves violaciones a los derechos humanos cometidos durante 'el proceso' argentino. Observan que los militares que desataron el golpe de marzo de 1976 habían observado con preocupación las críticas de la comunidad internacional al régimen de Augusto Pinochet, quien tomó el poder en 11 de septiembre de 1973, menos de tres años antes. Según estas autoras, la técnica de desaparición forzada fue diseñada para no correr el mismo destino que Pinochet y los golpistas chilenos. Es decir, la opción de desaparecer a las personas consideradas peligrosas por el régimen en vez de procesarlas y mantenerlas como presos políticos, le quitaría a grupos como Amnistía Internacional la posibilidad de montar campañas internacionales contra el gobierno argentino. La técnica del desaparición forzada habrá sido, por esta teoría, una forma de mantener la capacidad de negar, de forma creíble, la violación masiva a los derechos fundamentes.[11]

¿Puede afirmarse, entonces, que el éxito de la Amnistía Internacional ayudó a crear el fenómeno de desaparición masiva en la Argentina? Puede parecer y hasta ser muy audaz esa afirmación de Keck y Sikkink. Lo importante aquí es el reconocimiento que las

[10] CAVALLARO, J.L. y BREWER, S.E., "La función del litigio interamericano en la promoción de la justicia social,"Revista Sur, Vol. 8, pág. 84 (2008).
[11] KECK, M. y SIKKINK, K., Activists Beyond Borders: Activist Networks in International Politics, Cornell University Press, 1998.

intervenciones en los derechos humanos sí tienen consecuencias y que no son siempre son las consecuencias deseadas.

Otro ejemplo más reciente es el caso de Amina Lawal, una mujer nigeriana condenada en primera instancia por una corte aplicando la ley islámica (sharia), a la muerte por lapidación por el crimen de adulterio. La sentencia inicial provocó una reacción intensa de las redes de activistas y ciudadanos ligados a los grupos internacionales. Amnistía Internacional desató una campaña que llevó a decenas de miles de cartas dirigidas a diversas autoridades en la región del norte donde la ley islámica se aplicaba. Sin embargo, no hubo necesidad de semejante reacción, pues no había riesgo real de que la sentencia fuese ejecutada. Según las y los activistas involucrados en la defensa de Amina Lawal, así como otras mujeres condenadas por las cortes locales, no había ningún caso en el cual tal sentencia hubiera sido aplicada, pues, los tribunales de apelación rechazaba tales condenas por su inconsistencia con las garantías en la Constitución de Nigeria.

La campaña no pasó desapercebida en Nigeria. Varias autoridades locales denunciaron las cartas como forma de intervención extranjera en Nigeria. Su discurso se fortaleció y ganó resonancia con el público local islámico. En algunos casos de penas menos severas impuestas según la sharia, las autoridades locales adelantaron o intentaron adelantar la imposición de la sentencia (de forma ilegal) para evitar la intervención extranjera. Después de algunos meses, líderes locales importantes se organizaran para pedir que las personas e instituciones ***no*** intervinieran más, pues la acción internacional estaba provocando acciones

y reacciones no deseadas. El efecto de las consecuencias no deseadas de esta campaña sobrepasó con creces cualquier avance que la campaña habría conseguido.[12]

De ahí surge la necesidad de la evaluación prágmatica, es decir, de costos y beneficios. Esta tesis por lo tanto, reconoce como elemento teórico esencial la necesidad de estudiar los derechos humanos y la supervisión internacional de los mismos no como tema puramente jurídico, sino como tema analizado a través de elementos empíricos. Es esencial que tal sea el enfoque no sólo en los estudios desarrollados por otros académicos, sino también por analistas jurídicos. Los textos aquí incluidos, por lo tanto, parten de la noción de que la evaluación del valor de distintos mecanismos, así como estrategias de defensa y promoción tiene que partir de un análisis de la aplicación de ideas sobre los derechos humanos en la práctica. Mis aportaciones combinan, de esta forma, los dos elementos teóricos reseñados aquí, es decir, (A) la necesidad de entender las acciones en los derechos humanos como intervenciones, las cuales pueden conducir a avances *y retrocesos*; y (B) la importancia de reconocer que los movimientos sociales y no los abogados, deben dirigir la dirección de, y ser los motores en las iniciativas de derechos humanos, si es que se quiere avanzar la búsqueda de la justicia social. De otro modo, existe el riesgo de lograr solamente avances jurídicos vacíos.

[12] Sobre la campaña y la reacción contra por parte de activistas locales, ver IMAN, A. & MEDAR-GOULD, S., How Not to Help Amina Lawal The Hidden Dangers of Letter Campaigns, en Counterpunch, disponible en: www.counterpunch.org/2003/05/15/how-not-to-help-amina-lawal/ La nota incluye una carta escrita por la directora de BAOBAB detallando los efectos negativos de la campaña. Amnistía Internacional apoyó al pedido de BAOBAB de para la campaña.

Este proyecto de tesis pretende mostrar que ha habido un déficit en este tipo de análisis práctico y multifacético con enfoque en los movimientos sociales. Más concretamente, el proyecto analiza dos áreas en las cuales los analistas de los derechos humanos y hasta muchos activistas han enfatizado el formalismo por encima del análisis concreto de los elementos esenciales para que los derechos humanos tomen forma y que mejoren las condiciones de los seres humanos en situaciones concretas. Las áreas son: (A) la presión ejercida por la comunidad internacional en estados que violan los derechos humanos en las Américas. Se analiza aquí la presión que se ha aplicado en particular a través del sistema interamericano, en lo que se refiere a los derechos económicos, sociales y culturales, así como en la naturaleza de los procesos judiciales. (B) las transiciones a la democracia. Concretamente, mi trabajo enfatiza, el análisis empírico así como la importancia de los movimientos populares frente a las presiones internacionales y examina los procesos que llevaron a la inclusión o exclusión de temas vitales, tales como los crímenes económicos y la seguridad pública, como resultado de la reproducción de un 'guión oficial'. Detallo, en seguida, estas dos áreas, explicando los textos incluidos.

A. El Sistema Interamericano, la política y el cambio social

Desde hace años, ha existido un debate sobre los derechos económicos, sociales y culturales (DESC) y las tensiones entre estos derechos y los derechos civiles y políticos. Analistas y activistas han insistido en que el reconocimiento de los DESC por las instancias jurídicas internacionales sería esencial para el avance de los derechos humanos en las Américas.

Vale subrayar aquí que esta tesis y su autor no dudan de la existencia de graves violaciones a los derechos económicos, sociales y culturales en un continente marcado por contrastes brutales y cada vez más pronunciados entre las clases sociales. Cuestiono, sin embargo, una idea implícita en la defensa de la exigibilidad de los DESC en el sistema interamericano; esta idea es que la mera articulación de estos derechos por una o más instancias internacionales llevaría necesariamente a avances en *el goce* de los derechos económicos por las personas socialmente marginadas. También está implícita la idea que el desarrollo de las normas jurídicas sobre los DESC no conlleva la posibilidad de retroceso. El artículo en el *Hastings Law Journal,* así como los otros incluidos en este compendio, cuestiono las bases de esta hipótesis, como se explica a seguir.

Los Antecedentes del Artículo en *American Journal of International Law*

En 2004, publiqué junto con Emily Schaffer, un artículo en la revista *Hastings Law Journal* (SSCI) sobre lo que creíamos ser la mejor forma de avanzar con la justicia social a través del uso del litigio en el sistema interamericano. El artículo en *Hastings* afirma 1) que aumentar la jurisprudencia, sin base adecuada en la Convención Americana sobre Derechos Humanos, puede llevar a reacciones negativas de los estados y a un retroceso en la eficacia del sistema en términos generales y por lo tanto en el goce de los derechos y 2) que las normas existentes en lo que se refiere a los derechos civiles y políticos son suficientemente amplias para promover los derechos humanos económicos, sociales y culturales, en tanto haya apoyo por parte de la sociedad civil, los medios de comunicación y los movimientos sociales. En ese artículo, afirmamos que:

> [T]eniendo en cuenta los recursos limitados [del sistema interamericano], las consecuencias potencialmente adversas de desarrollar estándares legales que podrían no aplicarse, y el potencial para socavar el respeto de los Estados por el propio sistema, inherente en el desarrollo de jurisprudencia novedosa, los procesos judiciales menos frecuentes y más focalizados podrían ser, de hecho, más valiosos. En concreto, instamos a los abogados y a los activistas del sistema interamericano a reconocer el papel limitado y a menudo subsidiario del activismo jurídico a la hora de promover el reconocimiento de los derechos económicos y sociales y la justicia distributiva. Al final, concluimos que la promoción exitosa de los derechos económicos, sociales y culturales en el sistema interamericano debería ser incremental, fundamentarse firmemente en los precedentes establecidos y ligarse siempre a vigorosos movimientos sociales y estrategias activistas efectivas.[13]

El artículo en *Hastings Law Journal*, escrito conjuntamente con Emily Schaffer, produjo una reacción y un debate importante en al mundo académico del derecho internacional en los Estados Unidos y en el resto de las Américas. Tara Melish, profesora estadounidense de derecho responde en algunos foros a nuestros planteamientos. Notablemente, en un artículo que publica en el *NYU Journal of International Law and Politics*, la profesora Melish critica el artículo inicial en *Hastings* atacando lo que ella califica como desvalorización de los DESC. El argumento de Melish se enfoca en su evaluación de lo que sería una falta nuestra de apreciar a los DESC y a su valor frente a los derechos civiles y políticos. Nos acusa de subordinar los DESC a los derechos civiles y políticos.

En la misma revista (*NYU Journal of International Law and Politics*, una de las más importantes revistas de derecho internacional en los Estados Unidos), respondemos al artículo de la profesora Melish. En este artículo, enfatizamos la importancia central de los

[13] CAVALLARO, J.L. y SCHAFFER, E., 'Less as More: PAGE

movimientos sociales en el proceso de determinar las estrategias para lograr avances en los derechos humanos.

En nuestra respuesta inicial a la crítica planteada por Tara Melish, explicamos que:

> El escrito de Hastings…[r]econoce que históricamente, y basándose en los instrumentos en vigor en el sistema hoy, los derechos civiles y políticos, y los derechos ESC se han tratado de forma diferente. El artículo señala … la Convención Americana incluye [] una única norma, general y vaga, sobre derechos ESC en el artículo 26.
>
> A la vista de los límites del artículo 26 de la Convención Americana, y también de la posible resistencia de los Estados a una jurisprudencia que no esté firmemente fundamentada en su comprensión de los instrumentos del sistema, el artículo de Hastings insta a los practicantes a buscar el progreso de los programas de justicia social apoyándose en los fundamentos más seguros posibles, aunque sin cerrar los caminos a un desarrollo gradual, más profundo…
>
> Destacamos que los efectos sobre el terreno de las decisiones del sistema no se han correlacionado directamente con los méritos de esas determinaciones, sino más bien han variado en relación con cuál es en ese momento la organización de la justicia social, la participación de los medios de comunicación y las estrategias de la sociedad civil. Como consecuencia de ese contexto más amplio, le pedimos a los practicantes recurrir al sistema dentro de sus límites y buscar medios para promover la justicia social mediante demandas judiciales bien fundadas en colaboración con los movimientos sociales, la sociedad civil y las estrategias en los medios de comunicación, en lugar de mediante la promoción de decisiones aisladas y excesivamente amplias sobre derechos ESC.

Nuestra respuesta a Tara Melish explica que nosotros no creemos que los DESC sean menos importantes que los civiles y políticos pero sí reconocemos los límites jurídicos y políticos del sistema interamericano. En nuestra respuesta a Melish, enfatizamos la importancia central

de los movimientos sociales en el proceso de determinar las estrategias para lograr avances en los derechos humanos. Ahí, enfatizamos que:

> diferimos acerca del papel de los movimientos sociales y la sociedad civil organizada en el proceso judicial. Mientras que Melish alega que está de acuerdo con nuestra posición al respecto, su análisis se encuadra estrictamente en los límites jurídicos y la lógica técnica del sistema judicial y cuasi-judicial interamericano. Melish nos ataca porque vemos las demandas como parte de una estrategia diseñada para promover la justicia social o producir efectos más allá de los actores en el proceso. A diferencia de eso, argumentos que reconocer los límites del sistema (sobre todo en términos numéricos) hace que cualquier enfoque a los procesos judiciales que no busque producir o al menos promover efectos que vayan más allá del caso concreto que se está decidiendo es ineficiente en el mejor de los casos y errónea en el peor. Afirmamos también que escuchar a los movimientos sociales y trabajar con ellos tiene consecuencias reales a la hora de estructurar las demandas y las formas en las que los órganos supranacionales se utilizan mejor. De manera simple, si un practicante se concentra en el fin de promover los programas de justicia social en lugar de en promover el reconocimiento judicial de los DESC, sus estrategias de uso de los tribunales diferirán. Como es evidente, ambas agendas se pueden traslapar bastante y lo usual es que así ocurra. Pero eso no ocurrirá siempre.

En 2008, escribimos una respuesta más precisa en la Revista *Sur,* publicación realizada en Sudamérica en los idiomas inglés, portugués y español, y que alcanza un público amplio en América Latina, y que tiene repercusión entre los académicos de Norte América cuyos intereses incluyen el sistema inter-americano. Este artículo analiza casos concretos en Brasil, respondiendo a las afirmaciones no fundamentadas en el artículo de Tara Melish. Explicamos cuál era el interés de los movimientos sociales en Brasil en determinados casos en los cuales trabajaba yo y por qué el desarrollo de la jurisprudencia internacional sobre los DESC *no* era el objetivo principal ni el método más eficaz para promover a justicia social en determinadas coyunturas reales. El artículo de la Revista Sur analiza dos casos de masacres

en el campo en Brasil, surgidas en función de conflictos por la posesión de la tierra. (Melish había criticado la actuación de los activistas en este litigio, tal vez sin saber que yo había sido abogado en los dos). En los casos, los movimientos sociales insistieron en Brasil y en los medios de comunicación en la necesidad de hacer una reforma agraria de forma inmediata y decidida; el enfoque de la campaña internacional era la brutalidad de los agentes de estado en la represión de las ocupaciones de los sin tierra. En la Revista Sur destacamos:

> En ambos casos, la agenda de incidencia priorizó resaltar las violaciones al derecho a la vida, en un esfuerzo por movilizar a la opinión pública local e internacional contra la utilización de la violencia policial para resolver conflictos de tierras. Ésta, más que un pronunciamiento del sistema interamericano sobre desalojos forzados, fue la meta principal de la estrategia de litigio. Más aún, tal enfoque visibilizó en ese momento a la estrategia de incidencia local. El movimiento de los sin tierra de Brasil, muy probablemente el movimiento social más desarrollado de América Latina, suele diseñar e instalar una variedad de estrategias para terminar con los desalojos forzados y aportar cambios en los patrones de tenencia de tierras. Éstas incluyen presión para obtener cambios legales, acciones de litigio en Brasil y principalmente, ocupación de tierras. Debido a que este último aspecto era central en su estrategia general, reducir el riesgo de futuras masacres policiales fue vital para el movimiento de los sin tierra.

Estos son los antecedentes para el desarrollo y publicación del artículo en el *American Journal of International Law (AJIL)* en 2008-2009. Cabe subrayar que el enfoque del artículo en *AJIL* es diferente del que anima las tres anteriores publicaciones. Lo central de los textos en *Hastings*, en *NYU Journal of International Law and Politics* y en *Revista Sur* es el papel más eficaz de litigio, es decir, de los profesionales del movimiento de los derechos humanos. El enfoque en el artículo de *AJIL* es *la Corte Interamericana de Derechos Humanos.* Es decir, en vez de analizar las mejores técnicas de litigio y de colaboración con los movimientos sociales, el artículo de AJIL estudia la actuación y de la Corte y sugiere formas de garantizar

que sus procedimientos y trabajo se estructuren de manera más beneficiosa para el avance de los derechos humanos y la justicia social en las Américas.

El artículo en *AJIL* busca responder a la visión legalista de Melish y otros que defienden, a veces de manera acrítica, la jurisprudencia interamericana como forma de proteger a y lograr avances en los derechos humanos. Más aún, el artículo en *AJIL* también contribuye a desarrollar una teoría sobre el papel de los mecanismos internacionales en la lucha por los derechos humanos en los países en desarrollo. El artículo cuestiona la aplicabilidad del modelo europeo (del Tribunal Europeo de Derechos Humanos) hasta la década de los 90 en los países en desarrollo, principalmente en América Latina. Analiza las tendencias jurídicas de la Corte Interamericana y destaca áreas en las cuales estas tendencias pueden tener efectos negativos para el goce de los derechos humanos en la práctica. El artículo enfatiza los factores esenciales en los procesos de cambio social relativos a los derechos humanos en las Américas: el papel de los movimientos sociales, de la sociedad civil, de los medios de comunicación, y de los llamados *´progressive insiders´,* es decir, funcionarios de gobierno interesados en la justicia social y los derechos humanos. Considerando el papel decisivo de estos grupos, el artículo estudia la práctica de la Corte Interamericana y hace recomendaciones concretas para que esta en su jurisprudencia y normas procesales facilite, y no complique, los esfuerzos dinámicos de los actores centrales.

El artículo describe el problema en estos términos:

> Hasta hoy, el modelo más completo sobre cómo y cuándo los tribunales supranacionales tienen éxito a la hora de influenciar las situaciones de derechos humanos es el original e innovador modelo propuesto en 1997 por Laurence Helfer y Anne-Marie Slaughter, que se basó en gran parte en el

> estudio del éxito del Tribunal Europeo de Derechos Humanos (TEDH). Helfer y Slaughter, que escribían en una época en la que el TEDH gozaba de elevadas tasas de cumplimiento de sus decisiones, identificaban una serie de factores que creían que contribuyeron al éxito del TEDH y que en potencia podían importarse a otros sistemas internacionales. Sin embargo, el modelo de Helfer y Slaughter reconocía que el arraigo del Estado de derecho en la zona y la naturaleza menor de la mayoría de las violaciones que se observaban en Europa Occidental habían sido factores clave para la efectividad del uso de los tribunales supranacionales en la región.
>
> Hoy los tribunales regionales de derechos humanos del mundo (incluido el TEDH con respecto a muchos de los Estados miembros admitidos recientemente) enfrentan el reto de promover los derechos humanos en Estados que pueden resistirse a las decisiones supranacionales y que padecen de violaciones de derechos humanos a gran escala y endémicas. En este entorno, muchos de los factores que hicieron exitoso el Tribunal Europeo en los primeros tiempos pueden haber perdido gran parte de su relevancia y poder explicativo. La efectividad futura de los tribunales regionales puede depender en lugar de eso de su capacidad de actuar de formas relevantes para un modelo de promoción de los derechos humanos que se aplique en Estados caracterizados por las violaciones y la resistencia sistemáticas a la autoridad supranacional. Este artículo es un esfuerzo inicial por establecer algunos de los contornos de un modelo como ese, incluyendo algunas de las características específicas que, en nuestra opinión, constituyen el papel de los tribunales supranacionales en este contexto.[14]

El artículo, a través del análisis del sistema interamericano, propone una teoría que explicaría cuando el litigio produce cambios reales en los países donde el estado de derecho es tenue o en los cuales hay resistencias a la implementación de determinaciones de instancias supranacionales en los derechos humanos.

> Para comenzar, afirmamos que es improbable que en los Estados en los que el respeto a los derechos humanos no está arraigado, los tribunales supranacionales vean ejecutadas automáticamente sus decisiones, en especial cuando esas decisiones implican un importante compromiso político o financiero o se refieren a problemas endémicos de derechos humanos. En

[14] Este texto viene de la traducción del artículo en el American Journal of International que está incluida en esta tesis por compendio.

> consecuencia, los tribunales supranacionales carecerán a menudo de poder para dar inicio a mejoras duraderas en la protección de los derechos humanos si se limitan a ordenarles a los gobiernos que cambien sus prácticas. En vez de eso, los principales participantes que provocarían esas mejoras serían, en general, los movimientos sociales, los activistas de derechos humanos, los miembros de los medios de comunicación, los miembros del gobierno con visiones progresistas de los derechos humanos y otros que llevan a cabo campañas activistas a largo plazo o presionan para que haya mejores políticas con respecto a un determinado problema. Por lo tanto, defendemos que es más probable que los tribunales supranacionales sean efectivos cuando sus procedimientos y su jurisprudencia son relevantes para los esfuerzos a largo plazo de esos sujetos por promover los derechos humanos.[15]

El artículo desarrolla una evaluación de varios casos concretos en los cuales el litigio ha contribuido—o no—al cambio social en las Américas. A partir de este inicial estudio empírico, el artículo analiza las prácticas de la Corte para ver hasta dónde están diseñadas de forma coherente con la promoción de los derechos humanos en el contexto actual de las Américas y no en un mundo imaginado. Concluye que varias prácticas que no son conducentes al goce de los derechos humanos y que estos deberían ser repensados. El texto en AJIL urge la Corte a estudiar y entender el contexto político de los estados en los cuales opera para así producir procesos y sentencias relevantes a los actores involucrados en el avance de los derechos humanos y la promoción de la justicia social. La traducción resumida del texto detalla las áreas en las cuales cuestionamos la actuación de la Corte—la reducción de las sesiones públicas, específicamente las audiencias, los allanamientos, o reconocimiento de responsabilidad por parte de los estados, y algunas tendencias jurisprudenciales. Resumimos así las preocupaciones nuestras:

[15] Idem.

> Sin embargo, en los últimos años la Corte ha sufrido reformas procesales que han reducido los días de audiencia pública y el número de testigos escuchados por la Corte en el examen de los casos individuales. Estos cambios, en nuestra opinión, pueden reducir a veces los efectos de la actividad de la Corte para los sujetos nacionales. Consideramos también los posibles retos que plantea la estrategia cada vez más frecuente de los Estados de reconocer su responsabilidad por las presuntas violaciones ante la Corte para el activismo y el cumplimiento de las sentencias, lo que a veces lleva a una reducción de la determinación independiente de los hechos y de los procesos activos contra ellos. Por último, se examinan los aspectos positivos y negativos de la reciente jurisprudencia de la Corte, y subrayamos la necesidad de hacer que sus sentencias sean más relevantes y receptivas a la realidad nacional de un determinado país. Al evaluar de forma crítica estos aspectos de la Corte Interamericana, demostramos cómo se aplica en la práctica nuestra teoría del litigio supranacional contra los Estados en los que no está arraigado el respeto a los derechos humanos y estudiamos las formas en las que los tribunales supranacionales podrían adaptar sus métodos de trabajo para maximizar sus efectos positivos.[16]

La Importancia del Contexto Local: El artículo del *Journal of Interdisciplinary History*

En el segundo artículo en este primer bloque, aplicamos la lógica empleada en los textos sobre el sistema interamericano al debate sobre el papel de las instancias internacionales en las luchas contra las dictaduras en Argentina y Chile. El artículo publicado en el *Journal of Interdiscipliary History* en 2008 cuestiona la tesis desarrollada por el Profesor Thomas Wright, quien analiza la historia del involucramiento de las instancias internacionales de protección a los derechos humanos en Argentina y Chile desde los 70. Wright califica el papel de las instancias internacionales como central y defiende la idea de que se habría avanzado de forma linear hacia una nueva fase en la implementación de los derechos. Para Wright, la creación del Tribunal Internacional Penal marca un nuevo hito en los derechos

[16] Idem.

humanos, y abriría una nueva época en la cual se verá la implementación eficaz de los derechos humanos. Otra profesora, Sonia Cárdenas, en otro texto, cuestiona el carácter central de las instancias internacionales. Para ella, lo que determina la reducción en el número de las desapariciones forzadas en Argentina, por ejemplo, es el contexto político interno y no las presiones internacionales. El artículo publicado en el *Journal of Interdiscipliary History* enfatiza el papel decisivo de los factores políticos internos en las transiciones argentina y chilena. Reconozco que las instancias internacionales pueden tener un impacto, pero insisto en que este papel no debe ser exagerado, pues el asumir el carácter central de las instancias internacionales resulta en un error histórico y podría resultar en equivocaciones con relación a las decisiones sobre acciones e intervenciones en situaciones reales contemporáneas.

El artículo afirma que a pesar de los avances en la creación de instituciones y mecanismos internacionales de protección a los derechos humanos:

> ha habido relativamente pocos cambios con respecto a los medios para obligar a los Estados recalcitrantes a aceptar los derechos más básicos de sus ciudadanos. Hoy, como antes, son los factores nacionales y los grupos activistas locales, mucho más que las presiones o los tratados internacionales, las principales fuerzas motoras para motivar a los Estados a respetar los derechos humanos. La presión internacional puede ser importante como estímulo para el cambio, pero su repercusión en las prácticas de los Estados individuales está limitada en gran medida por las condiciones políticas nacionales.[17]

[17] CAVALLARO, J., y BREWER, S.E., ¿Nunca Más? El Legado de las Dictaduras Argentina y Chilena para el Régimen Global de Derechos Humanos," Journal of Interdisclinary History (traducción entregada con esta tesis).

El artículo crítica la creencia excesiva en el poder de los nuevos mecanismos internacionales de protección a los derechos humanos de garantizar el avance de la justicia social y el respeto a los derechos humanos. En este sentido, es consistente con la posición que sostengo en lo que se refiere a la eficacia del sistema interamericano. A saber, el crear nuevas normas o incluso nuevos mecanismos, sin más, no significa, necesariamente, se va a poder transformar las condiciones que llevan a graves violaciones a los derechos humanos. Las normas y los mecanismos sí pueden ser útiles en la medida que formen parte de movimientos y presiones de los pueblos afectados. Para saber si un determinado avance en los derechos humanos conlleva un cambio real, hace falta salir del ámbito jurídico y entrar en el mundo real, es decir, en el campo de batalla de los derechos humanos.

1. Las Comisiones de la Verdad en los procesos transicionales

Este segundo conjunto de artículos evalúa de forma crítica, la visión tradicional, es decir, el modelo estándar, del mandato y amplitud de las comisiones de la verdad. En dos artículos, cuestionamos dos de los dogmas principales de la receta internacional referente a las comisiones de la verdad: (A) en enfoque en los derechos civiles y políticos y las violaciones de éstos y (B) la exclusión en los procesos transicionales del análisis de la seguridad pública en el período de la post-transición.

a. Los crímenes económicos y su exclusión de las comisiones de la verdad.

Mi capítulo en el libro *Transitional Justice from Below,* junto con Sebastián Albuja, analiza más de 30 comisiones de la verdad, muchas en América Latina, y estudia el mandato de cada una de estas comisiones para ver hasta donde se incluye o excluye cuestiones y crímenes económicos. Parte del reconocimiento de que las violaciones a los derechos económicos por las fuerzas autoritarias constituían, en la mayoría de los países que analizamos, un factor esencial para los que luchaban contra los procesos dictatoriales y a favor de la transición. Después, el capítulo demuestra que las comisiones de la verdad en las Américas jugaron un papel decisivo en la formulación de un paquete estándar de lo que una comisión de la verdad debería abordar. El texto del capítulo aplica la teoría de la aculturación a las comisiones de la verdad. Según la teoría de aculturación, en el ámbito internacional se desarrolla guiones que se repiten, los cuales pueden alejarse de las necesidades en contextos específicos pero siguen siendo aplicados en distintos países en función de la acción de aculturación.

En el capítulo escrito por mí, junto con el Dr. Sebastián Albuja, detallamos la teoría de la aculturación, parte del movimiento 'world sociedad' (sociedad mundo) que afirma que "La institucionalización de los modelos mundiales ayuda a explicar muchas características desconcertantes de las sociedades nacionales contemporáneas, como el isomorfismo estructural."[18] En el capítulo, junto con Sebastián Albuja, explico que:

[18] CAVALLARO, J. y ALBUJA, "¿Mirar Retrospectivamente para Ocuparse del Futuro? Justicia Transicional, Delincuencia Creciente y Construcción Nacional," Traducción del artículo publicado en Maine Law Review, Vol. 60, p. 461 (2008) (traducción del texto en el original inglés, entregada con esta tesis por compendio); ver nota 13 en la versión original en inglés para informaciones sobre la fuente inicial (Goodman y Jinks).

> El isomorfismo se puede definir a su vez como "similitud estructural entre organizaciones" basada en la adopción de guiones estandarizados a pesar de la existencia de diferencias entre contextos; diferencias que deberían producir una mayor variedad.
>
> Ryan Goodman y Derek Jinks aplican este marco al trabajo académicos sobre relaciones internacionales, y ofrecen una explicación del comportamiento estatal basada en la socialización de modelos o guiones globales. Goodman y Jinks argumentan que el comportamiento estatal en materia de derechos humanos, como en otras áreas, se ve influenciado con fuerza por el entorno, lo que lleva a que los sujetos sigan el comportamiento de otros a través de la mímica, la identificación y la maximización de estatus, un proceso colectivo denominado "aculturación".
>
> Una característica importante de este análisis es el reconocimiento de que, si bien un amplio rango de Estados pueden adoptar ciertas normas o estándares como resultado de la influencia de procesos de aculturación y asociativos, el grado de implementación de esos estándares variará ampliamente, dadas las diferencias en variables nacionales, como el nivel de desarrollo, infraestructuras y cultura local. Por consiguiente, se observa un "desacople", es decir, una divergencia entre las normas adoptadas y la práctica, lo que es un resultado esperable cuando las normas son importadas.[19]

El artículo aplica la teoría de la aculturación a las comisiones de la verdad (las 'TRC', del inglés, 'Truth and Reconciliation Commissions').

> Planteamos aquí que los esquemas de justicia transicional jerárquicos, de arriba abajo, basados en modelos internacionales, han sido adoptados por Estados en gran medida como resultado de procesos de aculturación, y no como una consecuencia de su adecuación a las necesidades específicas de un contexto. Por lo tanto, el isomorfismo y el desacople, características de otros

[19] CAVALLARO, J. y ALBUJA, "¿Mirar Retrospectivamente para Ocuparse del Futuro? Justicia Transicional, Delincuencia Creciente y Construcción Nacional," Traducción del artículo publicado en Maine Law Review, Vol. 60, p. 461 (2008) (traducción del texto en el original inglés, entregada con esta tesis por compendio).

> aspectos de la gobernanza estatal, están también presentes en los modelos de justicia transicional adoptados por los Estados nación.[20]

El resultado, en el caso de las comisiones de la verdad, ha sido la exclusión consistente de las violaciones de derechos económicos. En las más de 30 comisiones de la verdad (TRCs o CVR) estudiados, no se ha incluido los derechos económicos de forma importante. En América Latina, esto representa una oportunidad política perdida, ya que la denuncia de los crímenes económicos de los regímenes autoritarios podría tener el efecto de quitarles legitimidad popular, como ha ocurrido con los gobiernos democráticos. El artículo observa que en las Américas, "entre las bases sociales, la opinión pública rechaza fuertemente la corrupción a gran escala y los comportamientos reprochables económicos durante los regímenes democráticos. En gran medida, debido a los elevados niveles percibidos de corrupción, amplios sectores de la opinión pública en Latinoamérica tienen una tenue confianza en las instituciones democráticas."[21]

De ahí, la oportunidad perdida, es decir, la oportunidad de avanzar en el fortalecimiento de la democracia y el rechazo al autoritarismo y la explotación económica debido a la replicación de modelos internacionales, aplicados de forma casi ciega. Como concluye el capítulo:

> A pesar de los elevados niveles de rechazo popular a la corrupción y a las actividades económicas ilícitas tanto en los regímenes democráticos como autoritarios, las CVR constituidas por ciudadanos, "de abajo a arriba", también han excluido de forma regular de sus investigaciones los delitos

[20] Idem.
[21] Idem.

económicos y la corrupción. Aunque otras causas pueden explicar también este fenómeno, sugerimos que la transferencia y la institucionalización de un guion estándar desde arriba explican la exclusión de las preocupaciones relacionadas con la corrupción. En otras palabras, debería esperarse que estas comisiones omitieran los delitos económicos y la corrupción de sus investigaciones como reflejo del modelo institucionalizado extendido que las comisiones oficiales establecieron y promovieron.

El segundo artículo sobre este tema trata la cuestión de la seguridad pública en el período post-transición. Este artículo, el cual publiqué en el *Maine Law Review,* estudia tres casos, dos de los cuales se sitúan en las Américas, y demuestra el papel central de la falta de control del crimen común durante el periodo inmediatamente después de la transición, Analiza, también, cómo se trabaja en la seguridad pública durante la transición, con enfoque exclusivo en los crímenes políticos. Argumenta que la falta de reconocimiento de la necesidad de invertir en la seguridad pública en términos generales, y no sólo como respuesta al contexto limitado de abusos políticos de las épocas autoritarias, implica graves problemas para los gobiernos transicionales y post-transicionales.

El artículo propone que:

> Durante la etapa transicional de un Estado, se le ha prestado insuficiente atención a los delitos ordinarios durante esa transición y después. El proceso de construcción nacional requiere prestarle mucha más atención a la delincuencia común y al establecimiento de una policía transparente, eficiente y democrática, y a los sistemas de justicia penal que la controlen. Por desgracia, en lugar de hacer eso la justicia transicional, como campo, se ha concentrado de manera desproporcionada en los abusos del pasado y en los medios para reparar (o perdonar o superar) esas violaciones.

El artículo explica que el momento de la transición presenta una oportunidad única para enfrentar los problemas que serán claves para la democracia, oportunidad esta frecuentemente desperdiciada por los gobiernos transicionales. De ahí, enfatizo que:

> los procesos transicionales, a la hora de considerar el sistema de justicia penal, se han caracterizado por haberse concentrado en la prevención de las clases de abusos cometidos por los agentes del Estado que actuaban en los gobiernos totalitarios o autoritarios anteriores, como los secuestros secretos por motivos políticos, la tortura y las ejecuciones sumarias.[Pero] responder a esos abusos, si bien es necesario, no es suficiente para tratar los principales retos que enfrenta la justicia penal y las fuerzas de policía durante la etapa transicional y después.
>
> En lugar de concentrarse únicamente en los abusos pasados, argumento que los Estados transicionales deben pensar y planear a futuro el crecimiento abrupto de la delincuencia común y la consiguiente indignación pública que casi de forma inevitable llegarán con el proceso de transición. Estos Estados deben considerar también la variedad de retos que la violencia criminal le plantea a la seguridad democrática, algunos de los cuales son muy duros. En otras palabras, los Estados transicionales deben concentrarse tanto o más en las clases de problemas que puede anticiparse razonablemente (desde una perspectiva sistémica y a futuro) como en aquellos que han plagado históricamente a esos países durante los periodos de gobierno no democrático.[22]

Como el capítulo sobre la falta de inclusión de los crímenes económicos en las comisiones de la verdad, este artículo demuestra cómo la aplicación de 'guiones' y la adopción acrítica de dogmas puede llevar a resultados perjudiciales para los derechos humanos y la justicia social.

[22] CAVALLARO, J., "¿Mirar retrospectivamente para ocuparse del futuro? Justicia transnacional, delincuencia creciente y construcción nacional" *Maine Law Review*, Volúmen 60 (traducción entregada con la Tesis).

El artículo concluye:

> [los procesos de transición] han fracasado a la hora de preparar a las sociedades íntegramente para afrontar una de las principales amenazas asociadas con los Estados transicionales: la delincuencia común.
>
> La reestructuración de la justicia penal y los sistemas de policía es un proceso difícil, plagado de barreras políticas y constreñido por los recursos limitados. Incluso si los reformadores tomaran un enfoque holístico con respecto al cambio durante el periodo transicional, los retos que tendrían que encarar para reformar la justicia penal y la policía serían intimidantes. Hay pocas respuestas claras entre los académicos y los practicantes en el campo de la justicia penal a las preguntas que animan cualquier intento de reestructurar las fuerzas de policía durante una transición. No obstante, hay razones para creer que podrían combatir mejor la delincuencia común si su punto de partida fueran las necesidades y los retos futuros que tendrán que enfrentar la policía y los sistemas de justicia penal, en lugar de la necesidad de evitar la repetición del pasado.

CONCLUSION

En *El vuelo de Anteo*, Joaquín Herrera Flores explica como el sistema dominante nos lleva a buscar respuestas a los desafíos impuestos por la globalización, la concentración de la riqueza y los otros males provocados por el neoliberalismo en lugares equivocados. Herrera Flores escribe:

> Estamos como aquel marinero escocés que, después de haber tomado algunas pintas de cerveza, buscaba su cartera bajo la luz del único farol que iluminaba la acera muy lejos de la taberna donde sin duda alguien se la había *encontrado.* Nuestro marinero, a pesar de las nubes etílicas, sabía con toda seguridad que su cartera no iba a estar allí, pero también sabía que era el único lugar iluminado en muchos kilómetros a la redonda.[23]

[23] HERRERA FLORES, J., "Hacia Una Visión Compleja de los Derechos Humanos," en HERRERA FLORES, J., HINKELAMMERT, F.J., SÁNCHEZ RUBIO, GUTIÉRREZ, G., El Vuelo del Anteo, Editora Desclée, Bilbao, 2000, pág. 21.

He argumentado que los abogados y académicos de los derechos humanos han actuado a veces como el marinero escocés al que alude Herrera Flores, es decir, han buscado soluciones en lugares indebidos. Específicamente, he planteado que la búsqueda de la justicia económica a través de la exigibilidad aislada de los DESC en el sistema interamericano, así como la búsqueda de justicia transicional en los guiones ('scripts') establecidos son iniciativas destinadas al fracaso. De la misma forma, y por razones parecidas, he criticado las modificaciones hechas por la Corte Interamericana de Derechos Humanos sin considerar el contexto político en el cual opera este Tribunal. No es que los DESC no sean exigibles (deberían serlo) en las cortes internacionales, ni tampoco que lo que recomiendan los procesos de transición anteriores necesariamente esté equivocado. Pero sí es el caso que la búsqueda de las respuestas en el tema de los derechos humanos tiene que hacerse en la realidad y no en la teoría pura, entre los que sufren las violaciones y quienes luchan por su dignidad; la búsqueda tiene que acontecer en el contexto histórico, en la cultura, y el mundo real, en las batallas por la justicia social y no en las teorías o doctrinas divorciadas de la realidad.

De nuevo, como dice Joaquín Herrera Flores:

> Los derechos humanos no son categorías normativas que existen en un mundo ideal que espera ser puesto en práctica por la acción social. Los derechos humanos se van creando y recreando *a medida* que vamos actuando en el proceso de construcción social de la realidad.

Que siga, entonces, esta construcción.

2. **Artículo 34(5)(b):** Informe de los indicios de calidad de las contribuciones presentadas y, en su caso, con el factor de impacto y cuartil del Journal Citation Reports (SCI y/o SSCI) o de las bases de datos de referencia del área en el que se encuentren las publicaciones presentadas.

A. El debate sobre el sistema interamericano

Como he señalado arriba, el debate sobre el sistema interamericano y la mejor forma de trabajar para promover y proteger los DESC ha tenido bastante repercusión en el mundo académico, así como entre los operadores y usuarios del sistema. El artículo inicial de Cavallaro y Schaffer, el cual no hace parte de esta tesis por compendio, ha sido la base de un debate intenso no solo entre los autores iniciales y la profesora Tara Melish, sino también en la comunidad académica interamericana.

El debate ha sido destacado en unos de los libros de enseñanza jurídica más importante de los derechos humanos en los Estados Unidos. El texto, Human Rights: Second Edition (Louis Henkin, Sarah H. Cleveland, Laurence Helfer, Gerald L. Neuman, Diane F. Orentlicher, Foundation Press (2009), trata el tema en una seccion de casi diez páginas.[24]

el cual dedica una sección al tema.

[24] Ver Louis Henkin, Sarah H. Cleveland, Laurence Helfer, Gerald L. Neuman, Diane F. Orentlicher, *Human Rights: Second Edition*, Foundation Press (2009). El libro es uno de los dos o tres más usados en las enseñanza de los derechos humanos en las escuelas de leyes en los Estados Unidos. El debate está concentrado en las páginas 1464-1470.

En España, el debate ha sido tratado por el profesor Felipe González de la Universidad Carlos III, actual miembro de la Comisión Interamericana de los Derechos Humanos, y ex Presidente de la misma. González dedica nueve páginas de su estudio sobre el sistema interamericano al debate entre Cavalalro (con Schaffer y, después, Brewer) y Melish.[25] El debate ha aparecido en varios otros textos jurídicos en español, en varios países en las Américas.[26] La Revista del Instituto Interamericano de Derechos Humanos, institución cuya sede está a unas cuadras de la Corte Interamericana en San José, Costa Rica, ha publicado un artículo escrito por un abogado de la Corte Interamericana de Derechos Humanos (Oscar Parra) sobre el tema. En el artículo, publicado en el año 2009, al analizar las distintas posiciones respecto al artículo 26 y la exigibilidad de los DESC, se cita la tesis defendida por Cavallaro y Schaffer, así como a las visiones alternativas.[27] El libro, *Protección internacional de los derechos económicos, sociales y culturales: sistema universal y sistema interamericano*, publicado por el Instituto Interamericano de Derechos Humanos en 2008 también cita el debate y el texto inicial de Cavallaro y Schaffer. Según el servicio SSRN,

El artículo más amplio en este compendio, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court," ha sido escogido para la

[25] Ver, GONZÁLEZ MORALES, F., Sistema Interamericano de Derechos Humanos (tirant lo blanch, Valencia, 2013), páginas 418 – 426.

[26] Ver, por ejemplo, GUTIÉRREZ PERILLA, M., La obligación de garantizar el desarrollo progresivo de los DESC en el Sistema Interamericano, Publicación de la Red Universitaria sobre Derechos Humanos y Democratización para América Latina, Año 2, Nº 4, Julio de 2013. Buenos Aires, Argentina; otro ejemplo es un artículo sobre el derecho panameño, republicado en Brasil, WING SOLÍS, F., "Algunos parámetros para la incorporación de los estándares del sistema interamericano de protección de los derechos humanos en la tutela constitucional, legal y judicial del derechos a un ambiente sano en Panamá", Revista de Direito Econômico e Socioambiental, Curitiba, Vol. 1, no. 1, páginas 149 -182 (2010). De hecho, una búsqueda con los términos 'debate Cavallaro Melish DESC' o con otros parecidos revela centenas de 'hits' en distintas publicaciones a lo largo de las Américas.

[27] Ver, PARRA VERA, O., "Notas sobre acceso a la justicia y derechos sociales en el Sistema Interamericano de Derechos Humanos," Revista IIDH, Vol. 50, 2009, pág. 131.

1. Notas sobre el artículo 26 de la Convención Americana

publicación en el *American Journal of International Law*. Cabe subrayar que esta revista jurídica, de evaluación ciega por pares (*peer reviewed*), es la más prestigiosa de su género en el idioma inglés en los Estados Unidos y quizá el mundo. Acepta tan sólo dos artículos substantivos por edición; el comité de selección está compuesto por los más renombrados profesores del derechos internacional en el mundo de habla inglesa.

Este artículo ha servido de referencia para decenas de artículos y libros en los últimos cinco años. Por ejemplo, el servicio SSRN indica que el abstracto del articulo ha sido leído 1,235 veces y que el texto ha sido descargado 317 veces. Ha sido citado más de 20 veces en textos jurídicos en inglés, según las estadísticas de los servicios Westlaw y Lexis.

De igual forma, el artículo "Never Again?: The Legacy of the Argentine and Chilean Dictatorships for the Global Human Rights Regime," en el *Journal of Interdisciplinary History* Volúmen 39 (2008) (JCR-SSCI), sobre la importancia de la política nacional en la promoción de los derechos humanos, ha sido citado varias veces. Las cifras del servicio SSRN, por ejemplo, indican que se ha accedido al abstracto 371 veces y que se ha descargado el artículo 63 veces.

1. Debate sobre la justicia transicional

Los textos sobre las comisiones de la verdad también han tenido un cierto impacto en el mundo académico, así como en la academia. La tesis principal del capítulo sobre la ausencia de enfoque en los crímenes económicos en los procesos transicionales ha ganado fuerza en los últimos años. Concretamente, se ha citado el argumento del capítulo escrito por

Cavallaro y Albuja en distintas publicaciones.[28] Recientemente, el tema ha sido tratado en un texto que defiende la necesidad de incluir el tema de la corrupción y los derechos económicos en los procesos de transición en los países Magreb (del norte de África y el medio oriente). Un artículo que analiza el proceso histórico en las Américas y en África, y que cita el articulo nuestro, insiste que la justicia transicional tiene que ser "sacada del rincón de los 'derechos humanos' para así tratar corrupción."[29]

Recientemente, la profesora Clara Sandoval de la Universidad de Essex publicó un breve artículo en el cual destaca la necesidad de tratar los temas económicos, sociales y culturales en los procesos transicionales. La profesora Sandoval reconoce que se ha repetido la receta dominante en los procesos de transición, la cual ha excluido de forma consistente los derechos económicos, sociales y culturales. Sin embargo, ella insiste en que este enfoque debería cambiar. El artículo de Sandoval es un reconocimiento de la madurez del tema, tema al cual he podido contribuir.

Como escribe la autora:

> Los mecanismos de justicia transicional pueden utilizarse adecuadamente para responder a violaciones de derechos económicos, sociales y culturales que se hayan producido a gran escala y en el marco de conflictos o represión….[E]l cambio de paradigma —la ampliación del campo de la justicia transicional y la inclusión de los DESC, así como el uso de los mecanismos

[28] El texto ha sido citado en Westlaw y Lexis. También cabe notar que el texto sobre la necesidad de tratar la delincuencia común ha sido bajado 77 veces en el SSRN y su abstracto ha sido visto ('abstract views') 375 veces.

[29] Leonard Gihone, 'Justice in Transition: Changing the Agenda,"disponible en: CITE. El autor dice en el original ingles, "To include corruption, transitional justice should be taken out of the 'human rights corner'.

> transicionales para resarcir tales violaciones— aún encuentra resistencia y pasará cierto tiempo hasta que sea ampliamente aceptado.[30]

Mi labor intelectual, aquí presentada, al igual que mi trabajo como activista y partícipe en los movimientos por los derechos humanos, forma parte de este proceso de transformación de la óptica de los derechos humanos para ampliar el campo de justicia transicional, para repensar la manera de evaluar el progreso en los derechos humanos y para formular estrategias y herramientas prácticas y útiles en la campaña para lograr un cambio positivo y tangible en la situación de derechos humanos.

Los estudios en la Universidad Pablo de Olavide, así como en los textos aquí presentados, también han llevado a la producción de otros textos académicos y prácticos, algunos de los cuales están registrados en la página que sigue.

[30] SANDOVAL, C., La justicia transicional y las violaciones de derechos económicos, sociales y culturales, Revista Aportes, (dic. 2013), p. 8.

Otras aportaciones científicas de James Cavallaro (y de James Cavallaro y otros) derivadas directamente o indirectamente de la tesis doctoral:

D. Saver, C. Sanhueza, J. Cavallaro, J. Contesse, C. Rodríguez, NO NOS TOMAN EN CUENTA: Pueblos indígenas y consulta previa en las pisciculturas de la Araucanía, (Universidad Diego Portales, Santiago, Chile) (2013).

James L. Cavallaro y Fernando Delgado, The Paradox of Accountability in Brazil (La paradoja de la rendición de cuentas en Brasil), en Vesselin Popovski y Monica Serrano (eds.) AFTER OPPRESSION. TRANSITIONAL JUSTICE IN EASTERN EUROPE AND LATIN AMERICA (TRAS LA REPRESIÓN. LA JUSTICIA TRANSICIONAL EN EUROPA DEL ESTE Y AMÉRICA LATINA), Tokyo, UN University Press (2012)

J. Cavallaro, et al, LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN (VIVIENDO BAJO LOS AVIONES NO TRIPULADOS: MUERTES, LESIONES Y TRAUMA A CIVILES COMO RESULTADO DEL USO POR EU DE AVIONES NO TRIPULADOS EN PAQUISTÁN), Stanford/NYU (2012)

Stephan Sonnenberg y James L. Cavallaro, Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights (¿Señalar, denunciar y luego llegar a acuerdos? Aplicando principios de la resolución de conflictos al ámbito de los derechos humanos), 39 WASH. UNIV. J. OF LAW & POLICY (2012)

James L. Cavallaro, Legal Comment: How to Advocate Against Torture? Understanding and Countering the Dynamics of Support for Abusive Interrogation (Comentario Legal: ¿Cómo abogar en contra de la tortura? Entendiendo y desarmando los argumentos con los que se pretende sustentar las técnicas de interrogatorio abusivas), en J. Hanson, ed. IDEOLOGY, PSYCHOLOGY, AND LAW (Oxford) (2012)

J. Cavallaro y Fernando Elizondo García, ¿Cómo establecer una Clínica de Derechos Humanos? Lecciones de los prejuicios y errores colectivos en las Américas, REVISTA JURÍDICA DE LA FACULTAD LIBRE DE DERECHO DE MONTERREY (2011)

L. Pedraza Fariña, S. Miller & J. Cavallaro, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR (NINGÚN LUGAR SEGURO: LA VIOLENCIA DE LAS MARAS, DEL ESTADO Y DE OTROS ACTORES EN EL SALVADOR), Rights Program Practice Series/Harvard University Press (2010)

J. Cavallaro, J, Kopas, Y. Lam, T. Mayhle, S. Villagra, LA SEGURIDAD EN EL PARAGUAY: ANÁLISIS Y RESPUESTAS EN PERSPECTIVAS COMPARADAS, Human Rights Program Practice Series/Harvard University Press (2008)

J. Cavallaro, J, Kopas, Y. Lam, T. Mayhle, S. Villagra, SECURITY IN PARAGUAY: ANALYSIS AND RESPONSES IN COMPARATIVE PERSPECTIVE (LA SEGURIDAD EN EL PARAGUAY: ANÁLISIS Y RESPUESTAS EN PERSPECTIVAS COMPARADAS), Human Rights Program Practice Series/Harvard University Press, (2008)

James L. Cavallaro y Spring Miller, No Place to Hide: Gang, State, and Clandestine Violence in El Salvador (NINGÚN LUGAR SEGURO: LA VIOLENCIA DE LAS MARAS, DEL ESTADO Y DE OTROS ACTORES EN EL SALVADOR), International Human Rights Clinic, Harvard Law School (2007)

M. Minow, S.E. Brewer, J. Cavallaro, F. Delgado, Y. Lam & D. Popowski, Mobilizing Against the Military Commissions Act of 2006 (La campaña en contra de la Ley de Comisiones Militares de 2006), 1 HARV. L. & POL. REV. (2006)

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TRADUCCIÓN DE:

CAVALLARO, J.L. AND SCHAFFER, E.J.,

LESS AS MORE: RETHINKING SUPRANATIONAL LITIGATION OF ECONOMIC AND SOCIAL RIGHTS IN THE AMERICAS, HASTINGS LAW JOURNAL, VOL. 56, P. 217

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MENOS ES MÁS:

REPENSAR EL USO SUPRANACIONAL DE LOS TRIBUNALES EN MATERIA DE DERECHOS ECONÓMICOS Y SOCIALES EN LAS AMÉRICAS

JAMES L. CAVALLARO Y EMILY J. SCHAFFER

INTRODUCCIÓN

Los activistas de los derechos humanos suelen presumir de que es más es más: que más tratados, más normas, más demandas judiciales, más leyes, más sentencias expansivas, etc., dan como resultado una mayor protección de los derechos. Este artículo cuestiona esa suposición en el contexto de los derechos económicos, sociales y culturales en el sistema interamericano. Argumentamos que teniendo en cuenta los recursos limitados de este sistema, las consecuencias potencialmente desfavorables de desarrollar estándares legales que podrían no aplicarse, y la posibilidad de socavar el respeto de los Estados por el propio sistema —algo que es inherente al desarrollo de jurisprudencia novedosa—, un uso del sistema de peticiones del sistema menos frecuente y más concentrado podría ser de hecho más beneficioso. En particular, instamos a los abogados y a los activistas que trabajan con el sistema interamericano que reconozcan el papel limitado y muchas veces subsidiario del activismo jurídico a la hora de promover el reconocimiento de los derechos económicos y sociales, y la justicia distributiva. En últimas, concluimos que la promoción exitosa de los derechos económicos, sociales y culturales en el sistema interamericano debería ser incremental, estar fundamentada con firmeza en precedentes firmes y estar siempre vinculada a movimientos sociales vigorosos y a estrategias activistas efectivas.

Este artículo insta a los practicantes, peticionarios, abogados y jueces, sobre todo a los que trabajan en la esfera internacional, a pensar creativa y críticamente sobre las estrategias para desarrollar la estructura jurídica y política necesaria para el cumplimiento efectivo de los derechos económicos, sociales y culturales. En particular, defendemos un enfoque pragmático del desarrollo de esta estructura en el sistema interamericano que se concentre en la repercusión que probablemente tendrán las peticiones en casos individuales en el mundo real. Planteamos que los que buscan cambios sostenibles, estructurales y transformadores en la sociedad latinoamericana, y no simplemente el reconocimiento judicial, estéril, de los derechos económicos, sociales y culturales, harán bien en adoptar un enfoque limitado, incremental, de "menos es más", con respecto a la expansión de estos derechos en el sistema interamericano.

Una revisión del grado de cumplimiento de las decisiones del sistema interamericano, así como de nuestra experiencia como activistas en la esfera internacional, nos ha convencido de que los efectos de las demandas internacionales ante los organismos de conflicto mejoran significativamente cuando los casos van acompañados de presión social sobre las autoridades nacionales recurriendo a una diversidad de medios. En contraste, las estrategias de uso de los tribunales que no están ligadas a otras formas de presión rara vez consiguen tener una repercusión importante y a menudo son irrelevantes en una forma tal que socaba la fortaleza de los organismos judiciales supranacionales. En muchos casos, el grado de repercusión está ligado de manera más estrecha no a la importancia de las acciones del sistema interamericano en un caso concreto, sino más bien al nivel del interés de los medios de comunicación y del público en el asunto y al grado en el que el gobierno se ve presionado a dar respuesta (por lo común, por los movimientos sociales o los medios de comunicación). Los estudios de caso de toda Latinoamérica, varios de los cuales examinamos como parte de nuestra investigación, ilustran este punto.

Puesto que los fundamentos teóricos y legales de los derechos humanos en Latinoamérica son relativamente sólidos, [1] este artículo se concentra en los enfoques dirigidos a incrementar la protección de los derechos económicos, sociales y culturales en la práctica. En concreto, consideramos las posibilidades para la expansión de estos derechos mediante su reconocimiento y cumplimiento por dos organismos de vigilancia de derechos humanos de la Organización de Estados Americanos (OEA): la Comisión Interamericana de Derechos Humanos (la "Comisión" o la "Comisión Interamericana") y la Corte Interamericana de Derechos Humanos (la "Corte" o la "Corte Interamericana"). Comenzamos analizando las condiciones necesarias para la implementación de los derechos económicos, sociales y culturales, y luego defendemos un enfoque para el activismo en el sistema interamericano que utilice de forma más efectiva este mecanismo intergubernamental para crear esas condiciones.

Analizamos las condiciones en las cuales [...] las decisiones aprobadas por estos mecanismos consiguen tener repercusión en el mundo real. Destacamos que mientras la implementación de las recomendaciones de la Comisión y de las órdenes de la Corte es una forma importante en la que estas decisiones pueden tener efecto

práctico, ese no es sin duda el único medio de tener repercusión. Exploramos este aspecto mediante estudios de casos que destacan varias formas en las que los activistas pueden usar las decisiones internacionales como parte de un enfoque integrado con respecto al activismo nacional.

El artículo examina las formas en las que los organismos de supervisión del sistema interamericano han abordado el cumplimiento de los derechos económicos, sociales y culturales hasta la fecha. Tanto la Comisión como la Corte han afrontado estas cuestiones en los últimos años. Argumentamos que cuando las acciones de Corte y la Comisión han sido importantes para promover los derechos humanos en las Américas, esos organismos lo han conseguido en gran parte mediante interpretaciones convencionales de las normas de derechos humanos que les han permitido a ambos conservar el respeto que les tienen los gobiernos y los activistas.

De hecho, instamos a los activistas a respetar la naturaleza dialéctica de la relación entre sociedad civil, y los Estados y las instituciones que constituyen el sistema interamericano: la sociedad civil puede buscar el cumplimiento de los derechos individuales mediante la utilización de los mecanismos de protección de derechos humanos del sistema interamericano; no obstante, el sistema depende del apoyo de la sociedad en cuanto a su legitimidad.[2] Los Estados proporcionan los recursos requeridos para mantener en funcionamiento el sistema interamericano y eligen a los individuos que se desempeñaran como comisionados y jueces en los organismos de vigilancia; pero estas instituciones también dependen para ser efectivas de la aceptación voluntaria de su autoridad por parte de los gobiernos y de la participación de buena fe en el marco de las normas establecidas de intervención. Y las instituciones que constituyen el sistema tienen la autoridad de resolver peticiones y de aprobar decisiones que requieran acciones por parte del gobierno y de sujetos de la sociedad civil; pero esa autoridad depende de la percepción de esos dos grupos de que se ejerce de una manera razonable y apropiada.

Como sujetos participantes en esta compleja red de instituciones interdependientes, los operadores jurídicos (es decir, los abogados, los comisionados y los jueces) que buscan la transformación progresista de la realidad latinoamericana deben ser conscientes de su papel limitado en la promoción de los derechos económicos, sociales y culturales. Es crucial aquí que nuestro argumento no se malinterprete. No sugerimos que los abogados de derechos humanos deban aceptar la grave desigualdad existente, ni que limiten su activismo a las áreas en las que el sistema interamericano puede usarse con más efectividad. En lugar de eso, recomendamos que los abogados de los derechos humanos internacionales acepten los límites inherentes al uso de los tribunales en el sistema interamericano y busquen medios alternativos para maximizar su repercusión a la hora de promover el programa de la justicia social. Describimos métodos mediante los cuales los activistas de derechos humanos pueden maximizar la repercusión social de sus acciones, como la defensa de los derechos políticos y civiles de los líderes de los movimientos sociales, o la presentación y el éxito judicial en casos relativos a un conjunto limitado de derechos económicos, sociales y culturales en unión con los movimientos sociales organizados.

En el mismo sentido, le instamos a la Corte y a la Comisión a que, como instituciones, no se vean fundamentalmente como impulsoras de una jurisprudencia visionaria, sino como inspiradoras del respeto por los derechos humanos, mediante sus actuaciones sobre todo como organismos consultivos y de decisión de conflictos, cuyas decisiones y recomendaciones permiten a aquellos que defienden los derechos económicos, sociales y culturales en la sociedad promover cambios concretos de la política pública estatal.

[...]

De forma gradual ha surgido un amplio consenso que afirma la necesidad de una mayor "exigibilidad judicial" de los derechos económicos, sociales y culturales. Este consenso ha llevado a una proliferación de esfuerzos provenientes de organizaciones no gubernamentales, declaraciones de organizaciones intergubernamentales y decisiones de organismos internacionales judiciales y semijudiciales de resolución de conflictos que buscan expandir el ámbito de la exigibilidad judicial de los derechos económicos, sociales y culturales, pero en muchas ocasiones limitándose a afirmar esa exigibilidad.

La idea de la existencia de derechos económicos, sociales y culturales ha sido reconocida al lado de la de los derechos civiles y políticos desde el establecimiento de los principios básicos de derechos humanos en la Declaración Universal de Derechos Humanos.[4] Esta idea se ha reiterado en el Pacto Internacional de Derechos Civiles y Políticos,[5] el Pacto Internacional de Derechos Económicos, Sociales y Culturales,[6] y, en las Américas, en el Protocolo Adicional a la Convención Americana de Derechos Humanos en Materia de Derechos Económicos, Sociales y Culturales (el "Protocolo de San Salvador").[7]

[...]

[...] El sistema interamericano carecía de un tratado vinculante en el área de los derechos humanos hasta 1969, cuando los Estados miembros de la OEA aprobaron la Convención Americana de Derechos Humanos.[12] Aunque la Convención Americana supuso claramente un avance en la defensa de los derechos humanos en las Américas, en el sentido de que proporcionó la protección propia de un tratado a principios que antes estaban contenidos solo en declaraciones no vinculantes, también representó un retroceso con respecto a la visión más amplia de derechos humanos proclamada por la Declaración Americana. A diferencia de la Declaración, la Convención no les reconoció a los derechos económicos, sociales y culturales el mismo nivel de especificidad que se había establecido en la Declaración, de mayo de 1948. De hecho, todo el asunto de los derechos económicos, sociales y culturales se reduce en la Convención Americana a un único artículo, el 26. Ese artículo, titulado "Desarrollo progresivo" declara que:

> Los Estados partes se comprometen a adoptar providencias, tanto a nivel interno como mediante la cooperación internacional, especialmente económica y técnica, para lograr progresivamente la plena efectividad de los derechos que se derivan de las normas económicas, sociales y sobre

> educación, ciencia y cultura, contenidas en la Carta de la Organización de los Estados Americanos, reformada por el Protocolo de Buenos Aires, en la medida de los recursos disponibles, por vía legislativa u otros medios apropiados.[13]

[…]Aunque esta norma menciona explícitamente los derechos económicos, sociales y culturales, ha mostrado su ineficacia como base para presentar peticiones individuales. De hecho, el artículo 26 no establece ningún derecho específico o deberes concretos. […] El académico y magistrado de la Corte Interamericana de los Derechos Humanos, Antônio Augusto Cançado Trindade ha escrito que "se ha mantenido un vacío en la protección de los derechos económicos, sociales y culturales en el sistema internacional de tratados en las Américas porque el artículo 26 de la Convención se limita al 'desarrollo progresivo' de estos derechos".[15]

La falta de protección de los derechos económicos, sociales y culturales en el sistema interamericano contrasta con su defensa activa de los derechos civiles y políticos. Además de sus otras funciones,[16] desde su creación en 1959 la Comisión ha revisado, procesado y adoptado conclusiones con respecto a miles de peticiones individuales en las que se alegaban violaciones de los derechos humanos fundamentales.[17] La Corte, mediante sus opiniones consultivas y, desde 1986, mediante su trabajo en casos contenciosos, ha decidido casos de abuso de derechos en un número más limitado, haciendo justicia a víctimas individuales y estableciendo precedentes importantes.

[…]

El Protocolo de San Salvador contempla específicamente las peticiones individuales a la Comisión Interamericana con el fin de hacer cumplir el derecho a la educación, protegido por el artículo 13, y ciertos derechos laborales, establecidos en el artículo 8, clausula (a). El artículo 19, clausula (6) declara que:

> En el caso de que los derechos establecidos en el párrafo a) del artículo 8 y en el artículo 13 fuesen violados por una acción imputable directamente a un Estado parte del presente Protocolo, tal situación podría dar lugar, mediante la participación de la Comisión Interamericana de Derechos Humanos, y cuando proceda de la Corte Interamericana de Derechos Humanos, a la aplicación del sistema de peticiones individuales regulado por los artículos 44 a 51 y 61 a 69 de la Convención Americana sobre Derechos Humanos.[20]

La inferencia negativa a partir del lenguaje usado en el artículo 19 es que la violación de otros derechos consagrados en el Protocolo no da lugar a un derecho de petición individual en el sistema interamericano. Aunque los peticionarios ante la Comisión han buscado defender la exigibilidad judicial de todos los derechos protegidos en el Protocolo, la Comisión ha interpretado el artículo 19 de manera restrictiva.[21]

II. La repercusión del uso de los tribunales internacionales: análisis y estudios de caso tomados de las Américas

Los académicos y los practicantes le han dedicado mucho más energía al estudio de los aspectos jurisprudenciales de las decisiones del sistema interamericano de derechos humanos que a evaluar el grado en el que esas decisiones se implementan en la práctica. No obstante, es justo la implementación de las decisiones y la repercusión de la vigilancia internacional sobre el nivel de respeto a los derechos humanos lo que debería importarle más a la comunidad de derechos humanos.

Aunque los practicantes de derechos humanos internacionales buscan garantizar que los organismos internacionales de vigilancia dicten decisiones favorables en casos individuales, también deben trabajar para garantizar que esas sentencias se cumplan. Además, la motivación para recurrir a los mecanismos de vigilancia internacionales proviene por lo general del deseo de incidir en las prácticas de derechos humanos mediante cambios en la política pública y, por consiguiente, se aspira con ello (o debería aspirarse) a conseguir algo más que resultados en los casos individuales. El efecto de las decisiones en casos particulares, el grado en que las decisiones se implementan, y la conexión entre los casos individuales y políticas más generales son por lo tanto asuntos que deberían ser de transcendental importancia para los practicantes de los derechos humanos internacionales. Debería ser obvio para aquellos involucrados en el uso de los tribunales y la resolución de casos individuales en el sistema interamericano que las decisiones resultantes son, en el mejor de los casos, un elemento de una red amplia de factores que pueden promover el cambio social.

No obstante, en la práctica los litigantes internacionales de derechos humanos muchas veces pasan por alto el conjunto más general de factores. Frente a la enorme desigualdad social, los abogados de derechos humanos en las Américas elaboran a menudo intrincados argumentos jurídicos que formulan casos particulares de injusticia social en el lenguaje de las obligaciones estatales y de los derechos individuales exigibles: esa es la moneda en el litigio de derechos humanos internacionales. Además, los abogados, los comisionados y los jueces responsables de resolver esas peticiones pueden considerar las decisiones individuales como una oportunidad para establecer una jurisprudencia visionaria, y pueden responder positivamente a este enfoque. Pero esa estrategia tiene varias desventajas. En nuestra opinión, los practicantes deben reconocer el potencial de producir resultados contraproducentes, bien porque las decisiones vayan más allá de lo que pueden lograr y es improbable que se cumplan, bien por la excesiva atención que se le presta a los enfoques basados en los derechos en detrimento de otros medios potencialmente más efectivos para buscar el cambio. Los practicantes deberían darse cuenta de que el uso de los tribunales, como cualquier otra herramienta, es útil en algunos casos, pero menos útil, e incluso contraproducente de hecho, en otros.

[…]

[Si] los abogados están aislados de los movimientos sociales, en lugar de [trabajando en colaboración] con ellos, entonces es probable que [el uso de los tribunales] sea

ineficaz de hecho. Sin embargo, si los practicantes contemplan el uso de tribunales internacionales como solo un elemento más entre los muchos que componen una estrategia integrada de activismo, y si trabajan en conjunto con los movimientos sociales, pueden evitar en el contexto nacional los peligros señalados por los estudios críticos del derecho.

Douglass Cassel ha recogido esta idea en la siguiente imagen:

> Lo que mueve los derechos humanos hacia delante no es un conjunto de cuerdas separadas, paralelas, sino una "soga" hecha de hilos múltiples y entrelazados. Quita un hilo y toda la soga se debilita. El derecho internacional de los derechos humanos es un hilo tejido en torno a todo el largo de la soga. Su principal valor no está en cuanta protección de los derechos humanos puede conseguir como hilo separado, sino en cómo fortalece toda la soga.[69]

[El artículo examina a continuación una serie de casos para identificar los elementos de un activismo exitoso que use el sistema interamericano. Concluye que las estrategias exitosas implican trabajar con los movimientos sociales, los grupos de la sociedad civil, los medios de comunicación y otros sujetos interesados. El artículo examina también casos en que las acciones o las decisiones de los organismos supranacionales han provocado una reacción negativa de los Estados].

D. Estudios de caso. Conclusiones

La experiencia dicta que los gobiernos aceptan las sentencias de la Corte cuando se cumplen una serie de condiciones. La primera se refiere a la legitimidad de la Corte y del sistema interamericano mismo. Un Estado acepta y da efecto a las decisiones de la Corte en la medida en que su sistema político interno reconoce la legitimidad del sistema interamericano y de la Corte en particular. Desde un punto de vista jurídico, este reconocimiento se puede codificar en el derecho.[112] Pero la indagación sobre la legitimación no debería limitarse a la legislación. Con el fin de que los Estados reconozcan y hagan cumplir las decisiones, en especial las que no les son favorables desde un punto de vista político, la legitimidad de la Corte debe aceptarse por las fuerzas políticas, la sociedad civil y los medios de comunicación.

Los estudios de caso demuestran varios principios importantes que nos permiten entender cuando es probable que los casos tengan repercusión nacional. En primer lugar, es decisivo, aunque no indispensable, que la demanda ante los organismos internacionales sea parte de una estrategia más amplia de movilización social para conseguir cambios. Otros elementos de esta estrategia incluyen el trabajo con periodistas favorables a la causa, como en *Loayza Tamayo* y varios otros casos brasileños citados, y con los movimientos internacionales y de base social. Las estrategias de uso de los tribunales que no tienen esa clase de vínculos, como ha ocurrido con la lucha contra la pena de muerte en Trinidad y Tobago, están

destinadas a fracasar casi con certeza, con independencia del resultado conseguido ante la Corte.

En segundo lugar, los activistas deben tener presente que una decisión final sobre el fondo de un caso por la Comisión o la Corte puede no ser la herramienta más efectiva para conseguir justicia, ni siquiera en un caso individual, puesto que es más probable que en algunos casos los Estados cumplan acuerdos extrajudiciales que órdenes de la Comisión o la Corte. De nuevo, este aspecto es una lección para los abogados que deben ser conscientes de su papel en un movimiento más grande, y no deberían concentrarse obstinadamente en conseguir sentencias judiciales que pueden tener pocos efectos.

Por último, se pueden sacar algunas lecciones importantes con respecto a la oportunidad. En primer lugar, los activistas deben aceptar un elevado grado de imprevisibilidad. El cambio de régimen y los programas políticos nacionales son fuerzas que son difíciles de prever con algún grado de certidumbre. Los litigantes deben reconocer esto y estar dispuestos a abogar por su caso o el problema ante la sociedad y ser capaces de hacerlo cuando el momento político del país lo permita. Deben reconocer también que la repercusión de los casos rara vez se establecerá por el calendario de la estrategia de uso de los tribunales. En lugar de eso, como los estudios de caso previos han mostrado, los puntos en los que la presión será efectiva se determinarán principalmente por los programas políticos nacionales, los movimientos sociales y otras fuerzas no jurídicas. Para ser efectivos, los litigantes internacionales deben aceptar su papel, muchas veces secundario o de apoyo, y estar preparados para hacer activismo en una nación cuando sea conveniente.

[…]

IV. DESARROLLO FUTURO

A. Expansión del artículo 26: una opción sospechosa

Una vía por la que se pueden promover los derechos económicos, sociales y culturales mediante la jurisprudencia del sistema interamericano es recurriendo a una interpretación expansiva del artículo 26 de la Convención Americana. Aunque la Comisión no ha cerrado la posibilidad de atribuir responsabilidad a los Estados por violaciones del artículo 26, la decisión de la Corte en *Cinco Pensionados* limita de forma sustancial hasta qué punto cualquiera de los dos organismos [del sistema interamericano] puede establecer, en casos individuales, la responsabilidad estatal por la falta de desarrollo progresivo los derechos económicos, sociales y culturales.

Hay pocas dudas de que una interpretación amplia del artículo 26 en la línea pretendida [por algunos activistas] sería la fórmula más fácil de incorporar los derechos económicos, sociales y culturales a la jurisprudencia del sistema interamericano. Sin embargo, la Comisión debería proceder con gran precaución en caso de seguir esa línea de razonamiento jurídico por varias razones.

En primer lugar, hay que tener en cuenta el hecho de que el artículo 26 no específica derechos exigibles ante los tribunales por los individuos.[173]

De hecho, los *travaux preparatoires* [sugieren] un empeño [estatal] consciente dirigido a debilitar las obligaciones del Estado a este respecto.[175]

[…]

En segundo lugar, en la medida en que, a pesar de lo dicho, se pudiera argumentar que el artículo 26 es ambiguo en cuanto a la creación de derechos exigibles judicialmente, la OEA parece haber resuelto esas dudas cuando redactó y adoptó el Protocolo de San Salvador. A diferencia del artículo 26 de la Convención, el Protocolo de San Salvador, que se ocupa específicamente de la exigibilidad de los derechos económicos, sociales y culturales, establece claramente las circunstancias en las que se podría considerar una violación de esos derechos mediante una petición a la Comisión Interamericana de Derechos Humanos. El artículo 19 declara que la violación de los artículos 8(a) y 13 da lugar al derecho a presentar una petición individual ante la Comisión Interamericana de Derechos Humanos.[177] Como hemos señalado, la implicación clara que tiene ese artículo es que las violaciones de otros artículos del Protocolo de San Salvador no dan pie a ejercer el derecho a presentar una petición individual a la Comisión Interamericana.

[…]

B. El camino más sabio: el desarrollo restringido de los precedentes de la mano de estrategias de movilización

Por diversas razones prácticas, políticas e históricas, los Estados tienden a apoyar la visión de que los derechos económicos, sociales y culturales no deberían gozar de la misma protección dada a los derechos civiles y políticos. En la medida que los activistas pretendan conseguir de manera realista el cumplimiento de las sentencias de la Corte sobre derechos económicos, sociales y culturales, deberían prestar atención a la resistencia gubernamental a implementar esos derechos. Una sentencia que imponga obligaciones a los Estados basada exclusivamente en una interpretación amplia del artículo 26 y de su uso como vía para hacer inmediatamente exigibles otras obligaciones de los tratados puede estar condenada al fracaso y es probable que provoque reacciones extremas de los Estados miembros de la OEA.

1. El principio general: hacia una interpretación evolutiva de los derechos humanos

La expansión de las normas de derechos humanos en el sistema interamericano seguirá teniendo un fundamento relativamente firme en la medida en que se pueda justificar como una interpretación legítima de las normas en desarrollo del derecho internacional de los derechos humanos. En al menos tres casos, una mayoría de la

Corte Interamericana ha invocado la interpretación "evolutiva" como la justificación para expandir el alcance de las normas existentes de derechos humanos [...].

La interpretación evolutiva es congruente con las normas generales de interpretación de los tratados establecidas por la Convención de Viena de 1969. Tanto esta Corte [...] como el Tribunal Europeo de Derechos Humanos [...] han mantenido que los tratados de derechos humanos son instrumentos vivos cuya interpretación debe considerar los cambios a lo largo el tiempo y las condiciones en el momento de su aplicación.[184]

Por consiguiente, la Corte ha establecido una clara línea de precedentes con respecto a la interpretación evolutiva. Los peticionarios venideros y la Comisión deben estar atentos a esa directriz de la Corte. Las nuevas líneas de precedentes deben ser la culminación lógica de las tendencias en el derecho internacional de los derechos humanos, en lugar de interpretaciones innovadoras (y con escaso apoyo). A continuación exponemos cinco de esas tendencias.

a. No discriminación

[...] El principio de no discriminación ha sido un fundamento valioso para extender los derechos económicos, sociales y culturales en circunstancias en las que esos derechos no serían en otro caso fundamento de alguna protección. La ventaja de usar el principio de no discriminación es que los peticionarios, la Comisión y la Corte deben basarse en un derecho que es fundamentalmente civil para expandir los derechos económicos, sociales y culturales [...] Estas peticiones deberían realizarse de manera conjunta con los movimientos sociales para asegurar la coordinación de las estrategias y la máxima repercusión práctica.

b. Casos híbridos

Un segundo principio que debería guiar la expansión de los derechos económicos, sociales y culturales es lo que hemos llamado el "enfoque híbrido". Con ello nos referimos a casos en los que las violaciones denunciadas por los peticionarios y procesadas por el sistema interamericano son de abusos de los derechos civiles y políticos y, simultáneamente, de los derechos económicos, sociales y culturales. En otras palabras, los casos en los que la situación denunciada contiene elementos entrelazados de ambas clases de derechos proporcionan mayores posibilidades de implementación exitosa [...] [;] incluso si la Comisión y la Corte, debido a las limitaciones de su mandato, no están en capacidad de tomar una decisión sobre los derechos económicos, sociales y culturales presuntamente violados, su examen del caso bien puede proporcionar la presión necesaria para que todo el asunto, es decir, los derechos civiles y políticos y, también los derechos económicos, sociales y culturales, se incorporen al programa político del Estado.[185]

c. Interpretaciones económicas, sociales y culturales de los derechos civiles y políticos: el enfoque de los elementos

En este concepto de derechos híbridos, hay que prestar especial atención a los elementos económicos, sociales y culturales de los derechos civiles y políticos. De esta forma, los casos que presentan hechos de los que cabe inferir un abuso de los elementos económicos, sociales y culturales de un derecho civil o político específico permitirán que la Corte considere estos elementos sin necesidad de una decisión expresa con respecto a los derechos económicos, sociales y culturales. Esta idea puede expresarse también a partir de los efectos nocivos de las violaciones de los derechos económicos, sociales y culturales para uno o más derechos civiles y políticos. De esta forma, se pueden tratar los "elementos" económicos, sociales y culturales bien como los factores subyacentes que dan lugar a violaciones de los derechos civiles o políticos, bien como elementos inherentes a los derechos civiles y políticos que se han violado.

En el contexto interamericano, el enfoque de los "elementos" ha dado lugar a una interpretación expansiva del derecho a la propiedad[186] y del derecho a la vida.[187] [...] Un razonamiento parecido puede aplicarse a otros derechos civiles y políticos tradicionales con el fin de que incluyan en su ámbito elementos de los derechos económicos, sociales y culturales. [...]

d. Especiaciones de situaciones de abuso y de víctimas

Con esta cuarta tendencia, nos referimos a la preferencia por violaciones especificadas con exactitud y por las víctimas identificadas con claridad, en lugar de a violaciones amorfas y clases indefinidas de víctimas. En otras palabras, una petición que denuncia la violación del derecho a la educación de una comunidad específica (por ejemplo, una comunidad indígena o a un grupo asentado de trabajadores sin

tierra) tendrá una mayor posibilidad de implementarse que una decisión en la que se establezca una violación general de derecho a la educación que afecte a todos los niños de una nación o de una subdivisión política específicas. [...]

e. Concentración en los derechos con un acceso no cuestionado

Aquí nos referimos a la preferencia por la denuncia y los procesos judiciales relacionados con violaciones de derechos que tengan un claro acceso al sistema de peticiones individuales. Hasta la fecha, mediante el Protocolo de San Salvador, los peticionarios pueden denunciar violaciones del artículo 8(a) relativos a los derechos laborales asociativos, y del artículo 13, que protege el derecho a la educación. Podemos esperar menos resistencia de los Estados a las decisiones que ratifican estos derechos que a las que extienden la jurisprudencia existente a otros derechos económicos, sociales y culturales.

CONCLUSIÓN

El uso supranacional de los tribunales ha sido, y continuará siendo, una herramienta importante en los esfuerzos por promover el respeto a los derechos económicos, sociales y culturales en las Américas. Pero es simplemente una herramienta más entre otras muchas disponibles para los activistas sociales. Si se emplea imprudentemente, es decir, de forma indiscriminada, en exceso, sin la debida consideración a los factores no jurídicos que influencian los derechos económicos, sociales y culturales, tiene el potencial de producir más daño que bien. Hemos pretendido mostrar las circunstancias que se han reunido a la hora de crear un contexto que requiere que los activistas de los derechos económicos, sociales y culturales en las Américas sean cautos y prudentes para ser efectivos. Estas circunstancias incluyen severos límites al acceso al sistema interamericano, la frágil naturaleza de los organismos supranacionales y el potencial de incumplimiento por parte de los Estados.

[...]

El uso de los tribunales como parte de una campaña más amplia puede promover los derechos económicos, sociales y culturales, aún sin necesidad de tener que reivindicarlos de forma directa ante los tribunales. A pesar de estas limitaciones, el uso de los tribunales internacionales puede ser efectivo. Defendemos que cuando el uso de los tribunales internacional se ocupa directamente de los derechos económicos, sociales y culturales, debe fundamentarse en precedentes firmes y una doctrina sólida, eliminando así la posibilidad de que el Estado rechace su legitimidad.

En última instancia, hemos intentado delinear un camino que refleja un enfoque pragmático, en el que el uso de los tribunales está vinculado muy de cerca con los movimientos sociales y las campañas no jurídicas, y hemos proporcionado ejemplos

de posibles casos que se podrían litigar y de líneas de argumentación. Nuestra esperanza al presentar este enfoque con respecto a las demandas supranacionales sobre asuntos económicos, sociales y culturales no es desanimar a los practicantes de derechos humanos y que no usen el sistema interamericano para promover la justicia social, sino más bien animarles a hacerlo de una forma meditada y responsable. En nuestra opinión, es así como mejorarán sus posibilidades de éxito en sus batallas legales y aumentarán también sus probabilidades de producir cambios en el mundo real, al mismo tiempo que mantienen la credibilidad de los propios mecanismos supranacionales de vigilancia.

TRADUCCIÓN DE:

CAVALLARO J.L. AND SCHAFFER, E.J.,

***REJOINDER*:**

JUSTICE BEFORE JUSTICIABILITY: INTER-AMERICAN LITIGATION AND SOCIAL CHANGE, N.Y.U. JOURNAL OF LAW AND POLITICS, VOL. 39, P. 345 (2006).

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RÉPLICA:

LA JUSTICIA ANTES QUE LA EXIGIBILIDAD JUDICIAL DE LOS DERECHOS: LOS PROCESOS DE QUEJA ANTE LOS ÓRGANOS INTERAMERICANOS Y CAMBIO SOCIAL[*]

JAMES L. CAVALLARO Y EMILY SCHAFFER

I. INTRODUCCIÓN

En este número de *N.Y.U. Journal of International Law and Politics*,[1] Tara Melish critica un artículo que publicamos en el volumen 56 del *Hasting Law Journal*.[2] Ese texto, que en gran parte se basa en nuestra experiencia sumada de trabajo durante dos décadas con los defensores de los derechos y los movimientos en defensa de la justicia social en Latinoamérica y en los procesos judiciales sobre variados asuntos, ante la Corte y la Comisión Interamericana de Derechos Humanos, refuta parte de la sabiduría popular con respecto a la expansión de la exigibilidad judicial de los derechos económicos, sociales y culturas (DESC). Esperábamos que aquellos con intereses en el sistema reaccionaran enérgicamente. Así parece haber ocurrido con Tara Melish, a cuyo artículo respondemos aquí. Aunque tenemos diferencias con respecto a la interpretación de la jurisprudencia más reciente de la Corte, la principal

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tensión entre nuestros enfoques se centra en el papel de los procesos judiciales y cuasi-judiciales supranacionales para promover la justicia social. Mientras que Melish defiende, en apariencia en un vacío, la exigibilidad judicial de los DESC en el sistema interamericano, nosotros apoyamos un enfoque de los procesos judiciales y cuasi-judiciales en el sistema que considere los grandes límites (en lo numérico y lo político) a esa clase de litigios, y también los factores que fomentan o dificultan los efectos de las decisiones de la Comisión y la Corte en los Estados latinoamericanos.

La distorsión repetida que hace Melish de nuestros argumentos podría llevar al lector a creer que estamos en posiciones diametralmente opuestas: Melish defendería los DESC, y Cavallaro y Schaffer serían los antagonistas mal informados. De hecho, nosotros no nos oponemos por principio a los procesos judiciales supranacionales en materia de DESC, ni comprendemos erróneamente, como afirma Melish, los principios de admisibilidad del sistema interamericano. Las falsas tensiones que destaca Melish se disuelven cuando se estudian los argumentos presentados en nuestro artículo original, en lugar de leer los que ella nos atribuye, y cuando se reconoce que la descripción que hace Melish de los principios que guían los litigios sobre DESC en el sistema interamericano no es más que su propuesta, y no una descripción precisa de la jurisprudencia vigente.

Esta réplica resume nuestra posición inicial para aclarar nuestras ideas comunes, busca corregir la imagen creada por las distorsiones que hace Melish de nuestros argumentos,[3] responde a sus críticas cuando son relevantes para nuestra tesis inicial, y reitera y refina lo que creemos que son los elementos del camino más sabio para para promover la justicia social mediante los procesos judiciales y cuasi-judiciales supranacionales en el sistema interamericano.[4]

II. LOS TÉRMINOS DEL DEBATE

A. **El argumento de menos es más**

En el argumento que publicamos en Hastings, exponemos nuestra tesis principal en los siguientes términos:

> [T]eniendo en cuenta los recursos limitados [del sistema interamericano], las consecuencias potencialmente adversas de desarrollar estándares legales que podrían no aplicarse, y el potencial para socavar el respeto de los Estados por el propio sistema, inherente en el desarrollo de jurisprudencia novedosa, los procesos judiciales menos frecuentes y más focalizados podrían ser, de hecho, más valiosos. En concreto, instamos a los abogados y a los activistas del sistema interamericano a reconocer el papel limitado y a menudo subsidiario del activismo jurídico a la hora de promover el reconocimiento de los derechos económicos y sociales y la justicia distributiva. Al final, concluimos que la promoción exitosa de los derechos económicos, sociales y culturales en el sistema interamericano debería ser incremental,

> fundamentarse firmemente en los precedentes establecidos y ligarse siempre a vigorosos movimientos sociales y estrategias activistas efectivas.[5]

El escrito de Hasting estudia el desarrollo histórico de los derechos civiles y políticos, y de los derechos ESC en el sistema interamericano. Reconoce que históricamente, y basándose en los instrumentos en vigor en el sistema hoy, los derechos civiles y políticos, y los derechos ESC se han tratado de forma diferente. El artículo señala que si bien la Declaración Americana incluye específicamente una enumeración de derechos ESC, la Convención Americana incluye en lugar de eso una única norma, general y vaga, sobre derechos ESC en el artículo 26. El escrito de Hastings resume los desarrollos teóricos en las últimas décadas que han demostrado que la distinción clásica entre derechos civiles y políticos y derechos ESC está plagada de problemas;[6] afirma también que la comprensión más coherente se centra en los deberes parecidos que tienen los Estados con respecto a ambos conjuntos de derechos.

A la vista de los límites del artículo 26 de la Convención Americana, y también de la posible resistencia de los Estados a una jurisprudencia que no esté firmemente fundamentada en su comprensión de los instrumentos del sistema, el artículo de Hastings insta a los practicantes a buscar el progreso de los programas de justicia social apoyándose en los fundamentos más seguros posibles, aunque sin cerrar los caminos a un desarrollo gradual, más profundo. Aunque cuestionamos las bases históricas que han llevado al sistema interamericano a tratar de forma diferente los derechos civiles y políticos, y los derechos ESC, reconocemos también en "Less as more" que las diferencias significativas y reales en los instrumentos relevantes y en la jurisprudencia limitan la posibilidad de reivindicar los derechos ESC ante la Corte mediante la aplicación del artículo 26. A la vista de este hecho, establecemos una variedad de formas en el que los litigantes podrían buscar promover la justicia social mediante los procesos judiciales en el sistema interamericano. Entre las técnicas que destacamos están las que se concentran en los elementos ESC que tienen los derechos civiles y políticos, las interpretaciones progresistas congruentes con el artículo 29 de la Convención Americana, el principio de no discriminación y los derechos económicos y sociales para los cuales se reconoce la posibilidad de presentar peticiones ante la Comisión y la Corte en el Protocolo de San Salvador.

Argumentamos en el escrito de Hastings que los practicantes deben reconocer el acceso limitado que proporciona el sistema cuando se mira el número real de casos, y también la debilidad del artículo 26, a la hora de diseñar estrategias de uso de los tribunales para promover la justicia social. Destacamos que los efectos sobre el terreno de las decisiones del sistema no se han correlacionado directamente con los méritos de esas determinaciones, sino más bien han variado en relación con cuál es en ese momento la organización de la justicia social, la participación de los medios de comunicación y las estrategias de la sociedad civil.[7] Como consecuencia de ese contexto más amplio, le pedimos a los practicantes recurrir al sistema dentro de sus límites y buscar medios para promover la justicia social mediante demandas judiciales bien fundadas en colaboración con los movimientos sociales, la sociedad y

las estrategias en los medios de comunicación, en lugar de mediante la promoción de decisiones aisladas y excesivamente amplias sobre derechos ESC.

Con respecto al artículo 26 y los derechos ESC, el escrito de Hasting se concentra en asuntos decididos por la Corte o en procesos judiciales que podrían llegar a la Corte.[8] Reconocemos que la Declaración Americana enumera expresamente derechos ESC y que por lo tanto podría constituir una base para las reclamaciones presentadas ante la Comisión Interamericana, pero no ante la Corte. En "Less as More" nos referimos a las reclamaciones que incorporan a la vez derechos civiles y políticos, y derechos ESC (mediante la Declaración, por ejemplo) como casos híbridos y animamos a los litigantes a que hagan uso de esa estrategia. En todos los casos, instamos a los litigantes a que trabajen más de cerca con los movimientos sociales para garantizar que los esfuerzos para utilizar el sistema interamericano maximicen su potencial de promover el cambio real en la sociedad.

B. Áreas de consenso y diferencias

Basándonos en esta comprensión de nuestra posición (en lugar de en la versión que Melish tiene de ella), sostenemos que entre los principales puntos en los que coincidimos nosotros y Tara Melish estarían los siguientes:

- En primer lugar, aunque las circunstancias históricas han llevado a una dicotomía maniquea entre derechos civiles y políticos, por un lado, y derechos ESC, por el otro, el fundamento teórico de esa comprensión es defectuoso. La comprensión preferida es que los derechos civiles y políticos, al igual que los derechos ESC, incluyen elementos tanto positivos como negativos e imponen a los Estados un rango de obligaciones que van de abstenerse de violaciones directas de los derechos a proporcionar bienes y servicios.[9]
- La Declaración Americana de los Derechos y Deberes del Hombre (1948) establece derechos ESC con mayor detalle que la Convención Americana. Las peticiones basadas en la Declaración Americana se pueden presentar ante la Comisión Interamericana, aunque no ante la Corte. Los demandantes deben reclamar por consiguiente las violaciones de derechos ESC en la Comisión, apoyándose en los derechos protegidos en la Declaración Americana.
- La Corte Interamericana no ha acogido ni tomado ninguna decisión, hasta la fecha, en la que haya encontrado una violación del artículo 26. Aunque Melish argumenta que una comprensión adecuada del artículo 26 requiere que la Comisión y la Corte decidan sobre violaciones de determinados derechos ESC, es claro que la Corte no lo ha hecho hasta ahora.
- Las decisiones generales de la Corte sobre la implementación progresiva de los derechos ESC aplicables a Estados en su totalidad es improbable que se cumplan y es ir más allá de lo que la Corte puede hacer. Melish se refiere a esta clase de estrategia de uso de los tribunales como una atención inapropiada a los elementos del cuadrante 4, es decir, a los deberes progresivos, orientados hacia los resultados, que solo son apropiados para la

supervisión, pero no para las decisiones judiciales.[10] Al presentar las estrategias de uso de los tribunales para promover la justicia social, nosotros subrayamos también la necesidad de concentrarse en "situaciones específicas de abuso y en víctimas específicas",[11] más que en las condiciones generales que afecta a poblaciones amplias.

- Más demandas, si no están bien diseñadas, ni promoverán la justicia social ni la eficacia del sistema interamericano. Tara Melish está de acuerdo con este análisis, y declara en esta edición del *N.Y.U Journal of International Law and Politics* que se adhiere con firmeza a la visión de que "demandas más centradas, redactadas de forma responsable, de alta calidad, llevan a mejores resultados, tanto desde el punto de vista jurisprudencia como en su aplicación real".[12]
- Para que una reclamación pueda ser objeto de una demanda en el sistema, debe contener varios elementos, como un daño concreto a personas específicas y una causa próxima,[13] y también otros elementos requeridos por las normas sobre admisibilidad del sistema interamericano. Aunque no nos ocupamos en nuestro escrito de esos requisitos separados, creemos que no hay nada en nuestro escrito de Hasting que sugiera nuestra falta de reconocimiento de los elementos centrales de una solicitud admisible en el sistema interamericano.[14]
- La propuesta del cuarto cuadrante para las demandas sobre derechos ESC como Melish la describe presenta una reconfiguración coherente de las recientes obras económicas sobre DESC, que puede ser superior al marco existente desarrollado por los órganos supranacionales, los cuales tienden a interpretar los instrumentos basándose en la dicotomía anticuada entre derechos civiles y políticos, y derechos ESC.[15]

Sería difícil no destacar lo suficiente la importancia de reconocer estas amplias áreas de consenso. Cuando uno se da cuenta, por ejemplo, de que nuestro escrito inicial de Hasting no cuestiona la admisibilidad judicial de los derechos ESC por principio, ni descarta la posibilidad de presentar demandas sobre derechos ESC recurriendo a la Declaración Americana, el fundamento de gran parte de la crítica de Melish simplemente colapsa.

Aparte de las tensiones imaginadas y de la representación errónea de nuestra tesis que permean su escrito,[16] hay poco de lo que escribe Melish que responda a nuestro artículo.[17] Aun así, a pesar de estas amplias áreas de consenso, estamos en desacuerdo con Melish en varios aspectos. Nos ocupamos brevemente de cada uno de ellos en esta réplica.

En primer lugar, es claro que estamos en desacuerdo con la posición actual de Melish[18] sobre la posibilidad de éxito a la hora de usar el artículo 26 para promover los derechos ESC. Nuestra interpretación de los instrumentos del sistema, al igual que la jurisprudencia de la Corte en esta área, nos lleva a encontrar relativamente poca esperanza en lo que nosotros y Melish llamamos el enfoque "directo" con respecto a las demandas sobre DESC ante la Corte. Diferimos también en cuanto a la posibilidad de que los Estados reaccionen negativamente a las decisiones de la Corte

que pudieran extender el alcance del artículo 26. En la sección IV nos ocupamos de la crítica de Melish a nuestra posición sobre el artículo 26, la jurisprudencia reciente de la Corte en esta área y la probable resistencia estatal a la expansión del artículo 26.

En segundo lugar, diferimos acerca del papel de los movimientos sociales y la sociedad civil organizada en el proceso judicial. Mientras que Melish alega que está de acuerdo con nuestra posición al respecto,[19] su análisis se encuadra estrictamente en los límites jurídicos y la lógica técnica del sistema judicial y cuasi-judicial interamericano. Melish nos ataca porque vemos las demandas como parte de una estrategia diseñada para promover la justicia social o producir efectos más allá de los actores en el proceso.[20] A diferencia de eso, argumentos que reconocer los límites del sistema (sobre todo en términos numéricos) hace que cualquier enfoque a los procesos judiciales que no busque producir o al menos promover efectos que vayan más allá del caso concreto que se está decidiendo es ineficiente en el mejor de los casos y errónea en el peor. Afirmamos también que escuchar a los movimientos sociales y trabajar con ellos tiene consecuencias reales a la hora de estructurar las demandas y las formas en las que los órganos supranacionales se utilizan mejor. De manera simple, si un practicante se concentra en el fin de promover los programas de justicia social en lugar de en promover el reconocimiento judicial de los DESC, sus estrategias de uso de los tribunales diferirán. Como es evidente, ambas agendas se pueden traslapar bastante y lo usual es que así ocurra. Pero eso no ocurrirá siempre.

En tercer lugar, en gran parte como consecuencia de nuestros distintos enfoques sobre los movimientos sociales, nosotros diferimos en cuanto a la importancia estratégica de concentrarse en casos que involucren violaciones del derecho a la vida. Melish critica los últimos desarrollos jurisprudenciales de la Corte Interamericana que expanden el ámbito de las obligaciones estatales en el contexto del derecho a la vida. A diferencia de ella, nosotros apoyamos este desarrollo por ser una continuación de una tendencia positiva que identificamos en el escrito de Hastings, y creemos que ese desarrollo debería orientar las estrategias activistas de justicia social que recurren al uso del sistema interamericano. Nos ocupamos de estas cuestiones en la Sección VI.

[…]

IV. El ámbito del artículo 26, las respuestas hostiles de los Estados y la utilidad del enfoque directo

A. El ámbito del artículo 26

En su guía de 2002 para la presentación de peticiones sobre DESC en el sistema interamericano, Melish afirmó la fuerza de las reclamaciones basadas en el artículo 26 de la siguiente forma:

> Aunque el "enfoque del artículo 26" es mucho más directo que el "enfoque de la integración", hasta ahora ha sido también mucho menos probado […] Además, ni la Comisión ni la Corte han sugerido nunca que el artículo 26,

> por sí mismo, exprese derechos protegidos. El enfoque del artículo 26 sigue siendo, por consiguiente, bastante incierto.[29]

Desde entonces, se le ha solicitado a la Corte en varias ocasiones que declare violaciones de los derechos ESC a la luz del artículo 26.[30] Es la propia Melish la que cita cinco ocasiones separadas en las que la Corte, frente a argumentos directos de supuestas violaciones del artículo 26 de la Convención, se ha negado a encontrar o no ha encontrado esa clase de violaciones.[31] Si bien Melish intenta minimizar la relevancia de esos casos y describe erróneamente un pasaje importante de la sentencia *Cinco Pensionados* en que la Corte se niega claramente a atender las reclamaciones basadas en el artículo 26 del demandante y los coadyuvantes (*amici curiae*), Melish no consigue convencer al lector de que su comprensión actual de los derechos ESC sea la que deba ser adoptada por la Corte. Que su comprensión sea la que se corresponde con la visión efectiva de la Corte es todavía menos convincente.[32]

B. Las posibles respuestas hostiles del Estado a la aplicación directa del artículo 26

[…]

[El artículo resume la teoría de Laurence Helfer sobre la sobrejuridificación y la aplica a las demandas sobre derechos ESC en el sistema interamericano]

La crítica de Melish no consigue apreciar además el delicado equilibrio existente en el sistema interamericano. La presión estatal para reducir el ámbito y los recursos de la Comisión y la Corte constituyen un elemento permanente del contexto en el que transcurren los procesos y se deciden los casos.[53] Además de negarse a aceptar la jurisdicción de la Corte o retirarse de la ratificación de la Convención Americana, un Estado puede también negarse públicamente a cumplir una sentencia de la Corte o no aplicar sus órdenes sin más. Es esencial reconocer esos factores, junto con los muy limitados recursos y capacidad del sistema para resolver casos,[54] en todo enfoque realista sobre peticiones en el sistema. Esa clase de enfoque debe buscar trabajar en los límites establecidos del sistema (o para moverlos, poco a poco) y ocuparse de una variedad de fuerzas sociales con el fin de evitar que una sentencia controvertida de la Corte se sitúe en el centro de la estrategia activista.[55]

Melish tiene razón cuando dice que el rechazo a las sentencias de la Corte no es específico de las peticiones sobre derechos ESC; de hecho, nuestros estudios de caso así lo demuestran. Pero nos ataca por no proporcionar pruebas directas que apoyen nuestra afirmación.[56] Sin embargo, nuestra afirmación es que una sentencia de la Corte basada exclusivamente en el artículo 26 probablemente generará una fuerte reacción negativa por parte del Estado afectado. Debido a que no ha habido sentencias de la Corte que apliquen de forma directa el artículo 26, no podemos citar reacciones a esas sentencias; en lugar de eso, hacemos una analogía con las respuestas del Estado a las decisiones de la Corte en casos de derechos civiles y

políticos, y también señalamos la percepción estatal sobre la legitimidad de la supervisión supranacional de los derechos ESC que se ha manifestado en otros sitios.[57]

[…]

C. La utilidad, o la falta de ella, del enfoque del artículo 26

Melish ha reconocido ella misma que el enfoque directo es en gran medida innecesario para conseguir ganancias prácticas. En su guía a la presentación de peticiones sobre derechos ESC ante el sistema interamericano, Melish comparó el "enfoque del artículo 26" con el "enfoque de la integración"; este último se referiría al encuadre de esas mismas situaciones de abuso que afectan a los derechos ESC como violaciones de derechos civiles y políticos protegidos en los artículos 3 a 25 de la Convención Americana:

> Como asunto práctico, pueden conseguirse en general resultados prácticamente idénticos recurriendo al "enfoque del artículo 26" o al "enfoque de la integración" […][T]odos los "derechos implícitos en la Carta de la OEA" pueden ser protegidos, en la mayoría de los casos, mediante los artículos 3 a 25 (usando el "enfoque de la integración". Por ejemplo, una violación del derecho a la salud puede alegarse con igual facilidad recurriendo al artículo 5 de la Convención (integridad personal) que utilizando el artículo 26 de la Convención ("los derechos implícitos en la Carta de la OEA"). Por consiguiente, los dos enfoques se pueden sustituir entre sí en muchos sentidos.[59]

El "enfoque de la integración" encaja en lo que hemos llamado enfoque de los elementos, es decir, la perspectiva que busca reivindicar los elementos ESC inherentes a los derechos civiles y políticos mediante interpretaciones amplias de este último conjunto de derechos. Melish reconoce así que un enfoque de los elementos como ese conseguirá "resultados prácticamente idénticos" al enfoque del artículo 26 en materia de demandas sobre DESC. […]

V. ESCUCHAR A LOS MOVIMIENTOS SOCIALES Y A LA SOCIEDAD CIVIL

Gran parte de la falta de comprensión de Melish sobre nuestro argumento surge de no haber apreciado nuestra concepción sobre el papel de los movimientos sociales, la sociedad civil y el activismo en los medios de comunicación para desarrollar campañas que promuevan la justicia social. Melish dice aceptar la importancia de trabajar con los movimientos sociales y la sociedad civil para promover ese objetivo.[61] [El artículo señala que Melish está de acuerdo con que el activismo debería acompañar las demandas] […]. No sostenemos que las demandas simplemente vayan acompañadas de las acciones de los movimientos sociales, el activismo en los medios de comunicación y otras formas de presión nacional e internacional.[63] Esta formulación, y la comprensión implícita del verbo "acompañar" que tiene Melish sugieren que serían las peticiones ante el sistema interamericano las

que deberían impulsar las estrategias activistas y que otros elementos deberían apoyarla. Defendemos que lo contrario es lo cierto. Es decir, campañas activistas más amplias pueden incluir las peticiones en el sistema interamericano, cuando sean apropiadas, pero las preferencias por los procesos judiciales supranacionales no deberían imponer límites al activismo en pro de la justicia social. Sin embargo, las estrategias activistas de justicia podrían llevar a restricciones o modificaciones de los métodos de litigio.

[…] En la práctica, los movimientos sociales están a menudo más interesados en el Tribunal como un vehículo para aumentar la visibilidad social de objetivos programáticos específicos más que como foro en el que promover la admisibilidad judicial de los derechos ESC. La probabilidad de que un caso se presente ante la Corte en un año dado contra un país específico es de menos del cincuenta por ciento. Teniendo en cuenta estos estrictos límites, argumentamos que los peticionarios deben repensar su comprensión del sistema. Con esos límites tan considerables al acceso, el sistema no puede considerarse de forma razonable capaz de responder a cada injusticia que ocurre en las Américas.[65] […] ¿Debería el único caso en un año determinado que la Corte recibe de Ecuador concentrarse en extender la admisibilidad judicial de las protecciones contra los desalojos forzados o en el asesinato de un líder indígena que buscaba el control de los recursos en tierras ancestrales? ¿Debería el único caso que probablemente llegue a la Corte sobre Brasil en un determinado año ocuparse de las personas que tiene problemas de salud mental, a través del prisma de un paciente golpeado hasta la muerte en un sanatorio mental cerrado, o en los esfuerzos por animar a la Corte a que reconozca una reclamación sobre derechos ESC basada en el artículo 26? Hay que reconocer que estas preguntas no se le presentan en esta forma exacta a ningún peticionario individual, sino que se derivan directamente de la capacidad extremadamente limitada del sistema y, en particular, de la Corte.

Si, como argumentamos, el principal objetivo de los demandantes supranacionales en el sistema interamericano debería plantear las cuestiones ante los órganos supranacionales al lado de otras estrategias activistas, entonces si el marco de derechos civiles y políticos ofrece una mayor oportunidad para el activismo y la promoción del cambio, debería ser en consecuencia ese marco, en lugar del marco de los derechos ESC, al que se le debería dar prioridad.[66]

[…]

VI. LA JURISPRUDENCIA Y EL ACTIVISMO INTEGRADO SE ENCUENTRAN: LA JURISPRUDENCIA EN DESARROLLO DE LA CORTE SOBRE EL DERECHO A LA VIDA

[…] los casos deberían elegirse cuidadosamente y, en nuestra opinión, en conjunto con los movimientos sociales y la sociedad civil organizada. Cuando así se hace, es probable que se le dé prioridad a las violaciones del derecho a la vida, en el contexto que sea. Hay al menos dos importantes razones para mantener este objeto de atención. La primera se refiere al desarrollo de la jurisprudencia de la Corte a este

respecto; la segunda implica el valor práctico del activismo en una petición relativa a las violaciones de este derecho.

Durante los últimos años pasados, la Corte ha desarrollado una comprensión cada vez más amplia del derecho a la vida. Sea lo que eso implique para la viabilidad del esquema de cuatro cuadrantes de Melish, como practicante se debe en algún punto aceptar la jurisprudencia de la Corte y aplicarla para promover los intereses de los individuos o grupos cuyos intereses el abogado representa.

Antes de escribir nuestro artículo, la Corte había ya establecido líneas prometedoras de argumentos a este respecto, que citamos como áreas potenciales disponibles para el uso de los practicantes. En los últimos dos años, la Corte ha ido aún más lejos en expandir su jurisprudencia sobre el derecho a la vida. En el caso Sawhoyamaxa,[90] la Corte determinó que el estado de Paraguay era responsable por la muerte de dieciocho niños indígenas a consecuencia de la falta de condiciones adecuadas para su bienestar atribuible a la inacción del Estado.

Melish, en lugar de recibir de buen grado esos progresos que proporcionan protección adicional a los excluidos en las Américas, ridiculiza a la Corte por expandir el derecho a la vida y advierte de las "tremendas" consecuencias que tendrá para ese órgano no aplicar su teoría de los cuatro cuadrantes para limitar su jurisdicción. Como esa autora afirma: "Hasta la fecha, la Corte no ha formulado ningún principio limitante para la expansión normativa del artículo 4".[91]

Mientras que la Corte no ha enunciado principios en el lenguaje del esquema de los cuadro cuadrantes propuesto por Melish, en el caso Sawhoyamaxa sí estableció estándares cuya aplicación permite limitar la responsabilidad del Estado por violaciones del derecho a la vida. La Corte declaró a Paraguay responsable sólo por las muertes ocurridas después de que el Estado hubiera sido informado de manera muy clara sobre el riesgo inminente para las vidas de los miembros de la comunidad. Como escribió la Corte [...]:

> Para que surja esta obligación positiva, debe establecerse que al momento de los hechos las autoridades sabían o debían saber de la existencia de una situación de riesgo real e inmediato para la vida de un individuo o grupo de individuos determinados, y no tomaron las medidas necesarias dentro del ámbito de sus atribuciones que, juzgadas razonablemente, podían esperarse para prevenir o evitar ese riesgo.[92]

Por lo tanto, en contra de las afirmaciones de Melish, el estándar elaborado por la Corte estableció límites claros sobre el alcance de la responsabilidad estatal conforme al artículo 4. En primer lugar, el riesgo debe ser "real e inmediato". En segundo lugar, las autoridades deben tener un conocimiento real o implícito. En tercer lugar, las autoridades estatales no tienen que haber adoptado medidas para ocuparse del riesgo. En cuarto lugar, las autoridades debe tener competencia para tomar esas medidas y, en quinto lugar, las medidas deben considerarse necesarias para prevenir o evitar el riesgo. Además, las medidas que deban adoptarse están sujetas al criterio

de razonabilidad. Ese criterio proporciona una amplia discrecionalidad para que los Estados americanos limiten su responsabilidad por muertes en su territorio. De hecho, sin perjuicio de su uso de términos diferentes a los elegidos por Melish, gran parte del razonamiento de la Corte encaja en los principios subyacentes de admisibilidad judicial tal y como ella entiende el concepto. Así, por ejemplo, la Corte establece en la cita aquí transcrita de Sawhoyamaxa que se concentrará en casos que impliquen "a un individuo o grupo de individuos específicos", a diferencia de comunidades nacionales. Este enfoque es coherente con la atención principal de Melish a los casos que involucran a individuos identificables, en lugar de a clases de víctimas. El lenguaje de la Corte sobre medidas necesarias y razonabilidad contiene, en efecto, valoraciones de la conducta, en lugar de centrarse en los resultados, usando los conceptos de Melish. En consecuencia, parece que Melish haría bien en repensar su crítica de la jurisprudencia en desarrollo de la Corte sobre el derecho a la vida.

Además, el valor para el activismo de una petición sobre el derecho a la vida apunta al núcleo de lo que otorga visibilidad y relevancia a un asunto en las campañas de los medios de comunicación, o para las organizaciones sociales de base y las redes de la sociedad civil. Las violaciones del derecho a la vida, sea en el contexto de los asesinatos de la policía urbana, las revueltas carcelarias, los conflictos sobre tierras, la falta de tratamiento a los pacientes de VIH o la omisión de prevenir que viviendas precarias sufran inundaciones,[93] tienden a tener más peso que las violaciones que no amenazan la vida. Cuando escribimos que trabajar con los grupos activistas (movimientos sociales, ONG, etc.) y seguir sus pasos como litigante tiene consecuencias para una estrategia de litigio, eso era parte de lo que queríamos decir. Por ejemplo, si uno está escuchando lo que dicen esos grupos, oirá su preferencia por concentrarse en aquellos que han muerto en sus luchas, en vez de en aquellos que sufren, de manera cotidiana, otros abusos de sus derechos. No sorprende por lo tanto que los movimientos sociales tiendan a valorar bastante los sacrificios hechos por sus miembros que han perdido la vida en el curso de sus luchas por la justicia social. Reconocer esto, en vez de luchar contra ello, tiene mucho sentido desde la perspectiva de un abogado practicante interesado por la justicia social en lugar de por el desarrollo jurisprudencial. [...]

VII. AVANZANDO

[...]

Nuestro artículo no considera la evolución futura de las demandas sobre DESC ante otros órganos supranacionales, ni considera tampoco una reforma amplia del sistema interamericano. El artículo de Melish busca claramente esbozar enfoques para otros foros judiciales supranacionales. Su modelo nos parece meditado y digno de consideración, especialmente, como ella señala, en el proceso de negociación del Protocolo Opcional del Pacto Internacional sobre Derechos Económicos, Sociales y

Culturales (para establecer un mecanismo de quejas individuales) y la redacción de una nueva Convención Internacional sobre los Derechos de las Personas con Discapacidad.[94] Si el sistema interamericano modificase sus tratados jurídicos vigentes sobre los derechos ESC, también merecería la pena considerar su enfoque en ese contexto. A corto plazo, los practicantes deberían trabajar con el sistema que existe. A este respecto, nuestros argumentos sobre la utilización del sistema interamericano, sobre escuchar y trabajo con los movimientos sociales y la sociedad civil, y sobre el papel de los procesos judiciales en el sistema interamericano a la luz de sus limitaciones actuales no son rebatidos en lo fundamental por el artículo de Melish.

TRADUCCIÓN DE:

CAVALLARO, J.L. AND BREWER, S.E.,

REEVALUATING REGIONAL HUMAN RIGHTS LITIGATION IN THE TWENTY-FIRST CENTURY: THE CASE OF THE INTER-AMERICAN COURT, AMERICAN JOURNAL OF INTERNATIONAL LAW, VOL 102, NO. 4. 2008

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UNA REEVALUACIÓN DEL USO DE LOS TRIBUNALES REGIONALES DE DERECHOS HUMANOS EN EL SIGLO XXI: EL CASO DE LA CORTE INTERAMERICANA

JAMES L. CAVALLARO Y STEPHANIE ERIN BREWER

I. [INTRODUCCIÓN Y PANORAMA GENERAL]

En las últimas décadas, los tribunales regionales de derechos humanos han crecido en número y actividad. El Tribunal Europeo de Derechos Humanos (el Tribunal Europeo o el TEDH) recibe hoy decenas de miles de peticiones y dicta más de mil quinientas sentencias de fondo cada año.[1] En los últimos tiempos, la Corte Interamericana de Derechos Humanos ha triplicado el número de casos que resuelve cada año. En el momento de escribir este artículo, a mediados de 2008, en el sistema regional de derechos humanos para África, la Corte Africana sobre Derechos Humanos y de los Pueblos, se prepara para oír sus primeros casos contenciosos.[2] En la actualidad, hay sesenta y ocho Estados que se someten a las decisiones de dos de los tribunales regionales establecidos (cuarenta y siete en Europa[3] y veintiuno en las Américas),[4] más del doble de los que había hace veinte años.[5] En el incipiente sistema africano, veinticuatro Estados miembros africanos han ratificado el Protocolo que establece la Corte Africana, y hay otros veinticinco Estados signatarios más.[6]

Cuando se observa desde la esfera internacional, los académicos y los practicantes interesados en promover los derechos humanos pueden dar por supuesto a primera vista, de forma instintiva, que este crecimiento de los tribunales en el panorama global es por fuerza una señal de un crecimiento equivalente en el poder del derecho internacional de los derechos humanos para proteger a los individuos en todo el mundo. No obstante, una atención desproporcionada a la existencia de estas instituciones, considerándolas de forma aislada, puede hacernos pasar por el alto el grado real de éxito que han tenido esos tribunales en los países sometidos a su jurisdicción. Si bien lo ideal es que el crecimiento de los órganos de derechos humanos con autoridad jurídica obligatoria (y la expansión de la jurisprudencia de estos órganos) se refleja proporcionalmente en mejores prácticas de derechos humanos en la realidad, la evaluación de los efectos nacionales de recientes decisiones supranacionales[7]

revela muchas veces una enorme distancia entre lo que ordenan los tribunales regionales y lo que pasa efectivamente en un país. La evidencia creciente de que una mayor institucionalización de la protección de los derechos humanos en la esfera supranacional no aumenta de forma necesaria el respeto por los derechos humanos en la práctica apuntaría hacia la necesidad de un nuevo modelo sobre cómo y cuándo el uso de los tribunales supranacionales puede tener efectos positivos en las prácticas de derechos humanos.

Hasta hoy, el modelo más completo sobre cómo y cuándo los tribunales supranacionales tienen éxito a la hora de influenciar las situaciones de derechos humanos es el original e innovador modelo propuesto en 1997 por Laurence Helfer y Anne-Marie Slaugther, que se basó en gran parte en el estudio del éxito del Tribunal Europeo de Derechos Humanos. Helfer y Slaughter, que escribían en una época en la que el TEDH gozaba de elevadas tasas de cumplimiento de sus decisiones, identificaban una serie de factores que creían que contribuyeron al éxito del TEDH y que en potencia podían importarse a otros sistemas internacionales.[8] Sin embargo, el modelo de Helfer y Slaughter reconocía que el arraigo del Estado de derecho en la zona y la naturaleza menor de la mayoría de las violaciones que se observaban en Europa Occidental habían sido factores clave para la efectividad del uso de los tribunales supranacionales en la región.[9]

Hoy los tribunales regionales de derechos humanos del mundo (incluido el TEDH con respecto a muchos de los Estados miembros admitidos recientemente) enfrentan el reto de promover los derechos humanos en Estados que pueden resistirse a las decisiones supranacionales y que padecen de violaciones de derechos humanos a gran escala y endémicas. En este entorno, muchos de los factores que hicieron exitoso el Tribunal Europeo en los primeros tiempos pueden haber perdido gran parte de su relevancia y poder explicativo. La efectividad futura de los tribunales regionales puede depender en lugar de eso de su capacidad de actuar de formas relevantes para un modelo de promoción de los derechos humanos que se aplique en Estados caracterizados por las violaciones y la resistencia sistemáticas a la autoridad supranacional. Este artículo es un esfuerzo inicial por establecer algunos de los contornos de un modelo como ese, incluyendo algunas de las características específicas que, en nuestra opinión, constituyen el papel de los tribunales supranacionales en este contexto.

Para comenzar, afirmamos que es improbable que en los Estados en los que el respeto a los derechos humanos no está arraigado, los tribunales supranacionales vean ejecutadas automáticamente sus decisiones, en especial cuando esas decisiones implican un importante compromiso político o financiero o se refieren a problemas endémicos de derechos humanos. En consecuencia, los tribunales supranacionales carecerán a menudo de poder para dar inicio a mejoras duraderas en la protección de los derechos humanos si se limitan a ordenarles a los gobiernos que cambien sus prácticas. En vez de eso, los principales participantes que provocarían esas mejoras serían, en general, los movimientos sociales, los activistas de derechos humanos, los miembros de los medios de comunicación, los miembros del gobierno con visiones progresistas de los derechos humanos y otros que llevan a cabo campañas activistas a largo plazo o presionan para que haya mejores políticas con respecto a un determinado problema. Por lo tanto, defendemos que es más probable que los tribunales supranacionales sean efectivos cuando sus procedimientos y su jurisprudencia son relevantes para los esfuerzos a largo plazo de esos sujetos por promover los derechos humanos.

Un corolario de nuestro argumento es que los tribunales supranacionales deberían considerar los casos individuales que son representativos de problemas persistentes o estructurales de derechos humanos como oportunidades para incentivar cambios más generales sobre las cuestiones relevantes. Por consiguiente, defendemos que los tribunales deberían seguir procedimientos que aumentaran la relevancia de los casos que deciden para los movimientos nacionales (y en algunos casos, internacionales) que se esfuerzan por eliminar las causas estructurales de las violaciones en cuestión. Sin esta finalidad estratégica amplia, el uso de los tribunales supranacionales, a los que accede un número diminuto de víctimas, funcionará como una lotería en la que el puñado de peticionarios cuyos casos llegan a un tribunal obtendrá beneficios no disponibles para la inmensa mayoría de víctimas en situación parecida.

Por último, destacamos que para decidir casos de derechos humanos en formas tales que sea probable estimular cambios duraderos, más allá del caso determinado, se requiere que un tribunal, aunque permanezca imparcial en sus evaluaciones fácticas y sus determinaciones jurídicas, siga estando no obstante cercano a elementos como el clima político y social predominante en los países sometidos a su jurisdicción; las estrategias de las campañas relevantes nacionales, regionales e internacionales de derechos humanos; los proyectos públicos existentes o futuros dirigidos a solucionar problemas de derechos humanos, y la conformación de la opinión pública nacional en cuestiones de derechos humanos. A este respecto, es axiomático que los tribunales, sean nacionales o internacionales, deben comprender la realidad en la que trabajan para ser relevantes y efectivos. Los tribunales nacionales, por su naturaleza y localización, es más probable que posean ese tipo de conciencia. Los tribunales supranacionales, cuya sede suele estar alejada de los países sobre los cuales tienen jurisdicción y que están inmersos en una red continuamente creciente de normas jurídicas globales, corren un mayor peligro de perder contacto con las realidades cotidianas de la gente. Este alejamiento potencial, combinado con la posibilidad de la resistencia a su autoridad, subraya la necesidad de que esos tribunales vigilen los aspectos concretos que inciden a favor y en contra de los derechos humanos en los Estados demandados y de que evalúen si pueden responder a esos aspectos y cómo pueden hacerlo, al mismo tiempo que mantienen su identidad como órganos judiciales imparciales.

Aunque evaluamos brevemente los desarrollos recientes del sistema europeo de derecho humanos, usamos la Corte Interamericana como el punto de vista principal desde el que elaborar nuestros argumentos. A partir de estudios de caso extraídos de la jurisprudencia de la Corte, argumentamos que este órgano ha tenido una mayor efectividad a la hora de contribuir al respeto de los derechos humanos cuando sus sentencias se han incorporado a las estrategias más generales de otros participantes dirigidas a promover cambios positivos con respecto a los problemas subyacentes. Sin embargo, en los últimos años la Corte ha sufrido reformas procesales que han reducido los días de audiencia pública y el número de testigos escuchados por la Corte en el examen de los casos individuales. Estos cambios, en nuestra opinión, pueden reducir a veces los efectos de la actividad de la Corte para los sujetos nacionales. Consideramos también los posibles retos que plantea la estrategia cada vez más frecuente de los Estados de reconocer su responsabilidad por las presuntas violaciones ante la Corte para el activismo y el cumplimiento de las sentencias, lo que a veces lleva a una reducción de la determinación independiente de los hechos y de los procesos activos contra ellos. Por último, se examinan los aspectos positivos y negativos de la reciente jurisprudencia de la Corte, y subrayamos la necesidad de hacer que sus sentencias sean más relevantes y receptivas a la realidad nacional de un determinado país. Al evaluar de forma

crítica estos aspectos de la Corte Interamericana, demostramos cómo se aplica en la práctica nuestra teoría del litigio supranacional contra los Estados en los que no está arraigado el respeto a los derechos humanos y estudiamos las formas en las que los tribunales supranacionales podrían adaptar sus métodos de trabajo para maximizar sus efectos positivos. Esperamos que nuestras conclusiones sobre el sistema interamericano sirvan como punto de partida para una reflexión parecida sobre otros sistemas y que contribuyan a la consolidación de un marco más aplicable en general para comprender cómo los tribunales regionales pueden promover los derechos humanos.

II. El papel de los tribunales supranacionales en la promoción de los derechos humanos

A. Ir más allá del modelo europeo occidental de cumplimiento

Durante casi tres décadas, el Tribunal Europeo proporcionó el único modelo para observar si un tribunal regional de derechos humanos podía influenciar las prácticas estatales y cómo podía hacerlo. Este modelo se celebró ampliamente por los académicos y practicantes como un triunfo [...]. Por consiguiente y, en general, si se toma la experiencia europea hasta los primeros años de la década de los años noventa como modelo sobre cómo los tribunales supranacionales deberían desempeñar su trabajo, se concluiría que un tribunal debería dictar jurisprudencia que ordenara a los Estados modificar sus políticas públicas para corregir problemas de derechos humanos, sabiendo que en un gran porcentaje de casos esas instrucciones inspirarían la formación y la práctica de la política pública nacional. Según este modelo, los avances procesales o jurisprudenciales que refuerzan un sistema de derechos humanos en el nivel regional, como los que permiten procesar más casos, se reflejaran en una correspondiente mejora de la protección de los derechos humanos en la esfera nacional.

Sin embargo, en los últimos quince años, los tribunales supranacionales han pretendido influenciar situaciones de derechos humanos muy diferentes de las que se vieron en Europa Occidental en las primeras décadas del TEDH. Incluso el panorama político del Consejo de Europa han cambiado de forma considerable durante este tiempo al admitirse un número significativo de nuevos miembros (casi todos antiguos Estados del bloque soviético). [...] Si se tienen en cuenta los problemas complejos y a menudo graves de derechos humanos de los que deben ocuparse hoy los tribunales regionales, el modelo de cumplimiento estatal ejemplificado por los primeros casos del TEDH no es ya el punto principal de referencia sobre cómo los tribunales regionales influencian la práctica estatal. De hecho, ahora puede ser la excepción en lugar de regla.

La razón de esa discrepancia se hace evidente cuando se considera el conjunto específico de factores que caracterizaron el sistema europeo durante los primeros años de los noventa. Y lo que es más importante, en esa época el Tribunal Europeo ejercía su jurisdicción sobre un grupo relativamente homogéneo de Estados europeos occidentales, en los que el gobierno democrático y el Estado de derecho ya estaban bien establecidos. Muchos de los Estados en el Consejo de Europa antes de la caída del Muro de Berlín compartían un compromiso específico con el cumplimiento de las decisiones del Tribunal Europeo en sus sistemas nacionales; un compromiso que no solo existía en la letra del derecho, sino también en la práctica.

[…] En su estudio del sistema europeo de 1997, Helfer y Slaughter reconocen que para que un órgano de derechos humanos goce del nivel de cumplimiento estatal visto en Europa, se deben reunir idealmente ciertas condiciones políticas y estructurales. Señalaban que

> [l]a existencia (en Estados sometidos a la jurisdicción de un tribunal supranacional) de instituciones estatales nacionales comprometidas con el Estado de derecho, receptivas a las reclamaciones de ciudadanos individuales, y capaces de formular y determinar sus intereses de forma independiente con respecto a otras instituciones estatales, es una condición previa muy favorable a las decisiones judiciales supranacionales efectivas. Incluso puede ser una condición necesaria (aunque no suficiente) para conseguir decisiones judiciales supranacionales de la máxima efectividad.[16]

En el mismo sentido, subrayaban la "naturaleza menor y accidental de la mayoría de las violaciones" tratadas por el sistema europeo, y añadían que el carácter no violento, administrativo, de la mayoría de las peticiones presentadas al TEDH hasta 1997 significaba que resolver los problemas subyacentes no requería revisiones a gran escala de la política pública en los Estados infractores.[17]

En cambio, la entrada de unos veinte nuevos miembros en el Consejo de Europa a principios de los noventa —muchos de los cuales eran Estados que habían sido parte del antiguo bloque soviético y se caracterizaban por las graves violaciones de derechos humanos y una experiencia más limitada con el Estado de derecho que Europa Occidental— ha enfrentado al TEDH un clima político significativamente diferente […]. De hecho, las violaciones violentas o a gran escala de los derechos humanos vistos en algunos de esos países a menudo tienen un gran parecido con aquellas que han plagado el sistema interamericano de derechos humanos por dos décadas.[24] Christina M. Cerna, de la Secretaría de la Comisión Interamericana, señaló en 2003 que "los conflictos que tienen lugar en estos Estados (algunos con regímenes democráticos recientes), como el conflicto de Rusia con los rebeldes chechenos, podrían justificar caracterizar este desarrollo como la latinoamericanización del sistema europeo".[25]

Como sugiere esta analogía, la experiencia del sistema interamericano ha sido muy diferente de la de los primeros años del TEDH. Cuando la Corte Interamericana se instauró en 1979, lo hizo en una región caracterizada en gran medida por regímenes autoritarios, atrocidades en masa y violaciones violentas de derechos humanos, como las masacres de comunidades indígenas y las prisiones, y también las desapariciones forzadas generalizadas de los disidentes políticos. Para la época en la que la Corte recibió sus primeros casos contenciosos en 1986, el panorama en las Américas estaba cambiando, pero todavía incluía varios Estados afligidos por el conflicto y democracias transicionales nuevas. Hoy, la Corte continúa decidiendo casos de violaciones graves, endémicas, de los derechos humanos, como la violencia paramilitar, las ejecuciones sumarias, el uso de tortura por la policía y violaciones brutales de derechos contra los individuos detenidos.

Resolver estos problemas requiere esfuerzos mucho más grandes y sostenidos que los que implicaron muchos de los cambios en las políticas promovidos por el TEDH durante sus primeros años. Sin embargo, las pruebas disponibles muestran que la Corte Interamericana tiene menos poder político, y no más, a la hora de conseguir que los Estados emprendan reformas de derechos humanos.[26] Como se analizará después, durante sus años de vida la Corte Interamericana ha tenido que enfrentar desafíos explícitos a su autoridad, un

incumplimiento generalizado de ciertos elementos de sus decisiones y un apoyo político insuficiente por parte de su organización matriz, la Organización de los Estados Americanos.

La experiencia de la Corte Interamericana y los retos a los que se enfrenta ahora el sistema europeo confirman nuestra creencia de que los primeros años del Tribunal Europeo no son un modelo representativo de cómo los tribunales regionales influencian las prácticas de derechos humanos, más allá de las democracias bien asentadas de Europa Occidental [...]. La pregunta que se plantea es, a nuestro juicio, ¿cómo los tribunales pueden influenciar de forma positiva las prácticas de derechos humanos cuando tratan con Estados que pueden no cumplir de forma automática las sentencias supranacionales?

Principalmente a partir de una revisión de estudios de caso del sistema interamericano,[28] defendemos a continuación que los tribunales supranacionales tendrán por lo general la mayor repercusión cuando sus procedimientos y sentencias sean relevantes para los sujetos que se esfuerzan por promover derechos humanos específicos en estos países, entre los cuales estarían no solo los funcionarios del Estado, sino también las organizaciones de derechos humanos, los movimientos sociales y los medios de comunicación. Este argumento encuentra apoyo en el análisis que hacen Helfer y Slaughter de los elementos que contribuyen a la efectividad de un tribunal de derechos humanos, uno de los cuales es ser consciente de quién es la audiencia. Helfer y Slaughter señalan que incluso en su momento de mayor éxito, el TEDH reconoció el valor de dirigir su jurisprudencia a una audiencia más amplia, y no solo a los gobiernos de los Estados, a la luz del siguiente punto de vista:

> Los individuos y sus abogados, las asociaciones voluntarias y las organizaciones no gubernamentales son en última instancia los usuarios y los consumidores de las decisiones judiciales para remediar un daño específico o para promover una causa específica o un conjunto de intereses [...] [A]preciar las relaciones entre estos sujetos sociales y las instituciones de gobierno del Estado abre la puerta a utilizarlas como fuerzas para expandir el poder y la influencia de los tribunales supranacionales.[29]

Sin embargo, sugerimos que en lugar de considerar a los intervinientes locales como fuerzas que se tienen que desplegar para aumentar el poder de un tribunal, los tribunales de derechos humanos deberían comprender que los tribunales internacionales de derechos son más efectivos cuando su trabajo contribuye a los esfuerzos desplegados por los activistas nacionales como parte de sus campañas más amplias de derechos humanos. El profesor Obiora Chinedu Okafur, en un análisis de los efectos de las recomendaciones de la Comisión Africana, está cerca de apoyar este enfoque:

> [U]n examen de las actuaciones o mecánicas por las que la influencia [del sistema africano] se ejerció revela que el sistema fue solo capaz de actuar en la forma en la que lo hizo porque en gran parte permitió voluntariamente su uso por varios grupos activistas que actuaban en Nigeria y estuvo dispuesto a adoptar formas creativas de competencia [...] La influencia del sistema les permitió [...] persuadir a muchos de un público enterado para que presionaran a que un régimen militar actuara en el sentido buscado por esos activistas, para justificar las interpretaciones preferidas de las normas constitucionales existentes y para avergonzar (y deslegitimar) al ejército en muchas ocasiones, ayudando así a transformar las ideologías del público relativas a la pertinencia del régimen militar y a muchas de sus prácticas características.[30]

En un análisis del cumplimiento de las recomendaciones de la Comisión Africana durante el periodo 1994-2003, Frans Viljoen y Lirette Louw anotan también que se mejora el cumplimiento cuando una petición a la Comisión Africana forma parte inseparable de un movimiento social más amplio. Estudian varios casos que ilustran el papel de la presión internacional y la movilización nacional a la hora de persuadir a los Estados para que cumplan con las recomendaciones de la Comisión.[31]

Por consiguiente, si bien hay cierto reconocimiento de que los tribunales supranacionales pueden maximizar su efectividad siendo receptivos a los contextos locales políticos y sociales en los que trabajan (incluidos los esfuerzos activistas en curso de los grupos nacionales), las obras académicas existentes proporcionan poca orientación sobre cómo esta percepción debería informar exactamente la práctica de los tribunales. Hasta la fecha, la mayor parte de las obras académicas se han concentrado en los aspectos jurídicos de la jurisprudencia supranacional, en vez de en cómo estos tribunales pueden maximizar su repercusión real en la sociedad. Con el fin de abordar este desequilibrio, buscamos desarrollar un modelo sobre cómo los tribunales pueden aumentar la probabilidad de promover el respeto por los derechos humanos en contextos de resistencia activa o pasiva al cumplimiento de sus sentencias.

[…]

Aunque la Corte [Interamericana] resuelve hoy un número mucho más grande de casos cada año, destacamos que sigue siendo un órgano con un acceso extremadamente limitado para la gran mayoría de las víctimas de violaciones de derechos humanos. Desde el nacimiento de la Corte a finales de 2007, ha dictado 174 decisiones en 95 casos contenciosos.[47] De 2004 a 2007, tras las reformas sistémicas que ya se analizaron en otra parte del artículo, la Corte decidió unos 14 casos al año, incluidos los 17 que resolvió en 2006. Aunque así estos números siguen representando un promedio de menos de un caso por año para cada país que ha reconocido su jurisdicción contenciosa. Si se tiene presente que la Comisión Interamericana recibe más de 1300 quejas por año, y eso de por sí es solo una fracción del total de víctimas de abusos de derechos, es evidente que los más o menos catorce casos resueltos por la Corte cada año no son más que un diminuto porcentaje de los casos potenciales que llegarían al sistema si se reconociera a toda víctima de derechos humanos su derecho a tener una audiencia judicial.

[El presupuesto de la Corte es muy inferior al del Tribunal Europeo e incluso inferior al de la Corte Africana, que en el momento de elaborar este escrito todavía no había decidido ningún asunto contencioso]

La falta de apoyo presupuestal no es la única indicación de que la Corte carece de un sólido respaldo político por la OEA. Por ejemplo, la OEA no ha respondido a las reiteradas solicitudes de la Corte de que cree un grupo de trabajo permanente para supervisar el cumplimiento de las sentencias de la Corte y elaborar informes que faciliten la discusión de este tema por la Asamblea General de la OEA.[56] […] La relevancia de la falta de un órgano de vigilancia permanente en la OEA se hace evidente cuando se considera que ochenta y cuatro casos de la Corte (el 88 por ciento de los asuntos resueltos en su jurisdicción contenciosa) estaban en la etapa de supervisión del cumplimiento a finales del 2007, lo que supone un aumento de 162,5 por ciento desde el 2003.[58]

III. La dinámica de la promoción de los derechos humanos en el sistema interamericano

[…]

En los apartados que siguen, identificamos lo que creemos que son las principales características del panorama de derechos humanos y las posibilidades para la promoción de los derechos humanos mediante el litigio supranacional en el sistema interamericano.

a. Los derechos humanos en el derecho y en la práctica

Muchos países latinoamericanos se caracterizan por el reconocimiento de una amplia variedad de derechos humanos en sus leyes, constituciones y ratificaciones de tratados. Sin embargo, esas normas jurídicas no se traducen muchas veces en una protección efectiva de los derechos humanos en la sociedad. Aunque la región ha salido de las dictaduras militares de las décadas de los setenta y los ochenta, lo que ha llevado a una reducción en los niveles de abusos de los derechos civiles y políticas patrocinadas por el Estados, sigue habiendo violaciones generalizadas de los derechos humanos, como las ejecuciones sistemáticas y selectivas, y el desplazamiento forzado causados por los grupos paramilitares en Colombia; los escuadrones de la muerte y los asesinatos policiales en Brasil; los abusos del ejército y el uso de tortura para conseguir confesiones en México, o la violencia extrajudicial persistente en Honduras, Guatemala y El Salvador. En muchas áreas, el Estado de derecho todavía se está consolidando, y en algunos casos los miembros del ejército o del partido político responsable por las violaciones masivas promovidas por el Estado en décadas recientes continúan teniendo cargos influyentes en los gobiernos actuales. Además, incluso si el gobierno nacional de un Estado intenta efectuar reformas de derechos humanos, la resistencia por parte de las autoridades gubernamentales y por los sujetos involucrados directamente en los abusos bloquea con frecuencia la ejecución de esas reformas.[60] En este clima, es todavía menos probable que las decisiones de un tribunal supranacional provoquen un cambio por sí mismas.

b. El cumplimiento del Estado con las órdenes de la Corte Interamericana

Una revisión de los casos anteriores de la Corte Interamericana demuestra que la Corte enfrenta en muchas ocasiones la falta de implementación de sus sentencias. Los gobiernos pueden rechazar abiertamente ciertas órdenes, pero todavía es más común que afirmen que cumplirán o están en el proceso de cumplir esas decisiones, y aun así no tomen los pasos necesarios para hacer que sus prácticas se ajusten a los requisitos de las sentencias de la Corte.

[…]

Nuestra revisión de las órdenes de cumplimiento revela un patrón claro [aunque no universal] en las reacciones de los Estados frente a las sentencias de la Corte. El patrón que surge demuestra que los Estados pagan en general la totalidad o parte de las indemnizaciones monetarias concedidas por la Corte. Además, los Estados cumplen con las reparaciones simbólicas, incluidas las relativas a las ceremonias públicas. Sin embargo,

cuando se trata de medidas de mayor alcance para reducir la impunidad y promover los derechos humanos (como enjuiciar las violaciones pasadas o cambiar las leyes o las prácticas), el cumplimiento es mucho menos probable.

[…]

En algunos países, sobre ciertos temas, la Corte puede inducir directamente cambios en las leyes y las prácticas; e incluso en casos en los que el cumplimiento no es total, una sentencia de la Corte puede llevar no obstante a derogar una ley violatoria o a tener un efecto significativo en un cuestión clave de derechos humanos. Además, algunos funcionarios de ciertos gobiernos nacionales han emprendido iniciativas para promover el cumplimiento de las decisiones de la Corte. Por ejemplo, el procurador general de Ecuador aprobó un proyecto de ley que establecía procedimientos automáticos para dar cumplimiento a esas decisiones.[79]

Sin embargo, en una gran mayoría de casos la Corte sigue teniendo que enfrentar problemas a la hora de conseguir una implementación sustantiva y duradera de sus órdenes de reparación […].

c. Los ingredientes de un caso exitoso: el litigio supranacional como herramienta activista

En lugar de surgir de forma directa de las órdenes de la Corte, los progresos en las prácticas de derechos humanos de numerosas sociedades latinoamericanas han dependido históricamente, en nuestra opinión, de la capacidad de los movimientos sociales y de los activistas de derechos humanos que trabajan con la sociedad de ejercer presión sobre las autoridades para ejecutar el cambio. Las estrategias activistas coordinadas, de largo plazo, necesarias para conseguir esa presión pueden implicar: la movilización y la organización de las bases sociales; el uso de los medios de comunicación y otras estrategias para atraer a la opinión pública; la cooperación con redes transnacionales de activismo para conseguir el avergonzamiento internacional, y la presentación de demandas judiciales sobre casos emblemáticos, lo que a veces implicará el uso del sistema interamericano.

[El artículo analiza una serie de criterios que los autores plantean como esenciales para que los casos interamericanos produzcan cambios en el mundo real. Esos factores son:

- *la atención de los medios de comunicación y el apoyo público*, que considera el papel de la intervención de los medios de comunicación en la promoción y la participación de la opinión pública.
- *los empleados y las instituciones del Estado y el activismo de derechos humanos*, que considera el papel de los "afines progresistas a la causa dentro del Estado", es decir, los miembros de los gobiernos interesados en promover el cambio desde adentro;
- *el papel de la presión internacional para reducir las violaciones sistemática*, que valora el papel de las redes sociales, citando el papel de académicos como Margaret Keck y Kathryn Sikkin, cuya teoría del boomerang evalúa el papel de la influencia internacional en las situaciones nacionales de derechos humanos.[102] Según esta teoría, los activistas nacionales emplean aliados internacionales para avergonzar y presionar a un gobierno en la esfera global, con lo que amplifican las exigencias de los

grupos nacionales y en última instancia sirven para "devolver esas exigencias a la esfera nacional"].[103]

d. El papel de la Corte: la relevancia de los activistas nacionales

[...] [Defendemos] que los tribunales serán más efectivos cuando comprendan la dinámica específica del cambio en un país o una región. La experiencia indica que el progreso de los derechos humanos en muchos países latinoamericanos es más probable cuando se puede conseguir una cobertura positiva de los medios de comunicación, apoyo público o presión internacional.

Con la advertencia de que a cada país y caso le aplica un conjunto específico de factores, concluimos ahora esta sección introduciendo (y en alguno casos reiterando) varias de las herramientas específicas que defendemos que la Corte debería tener presentes cuando estudia un caso.

Procesos públicos de la Corte: un punto focal del activismo en los medios de comunicación. Como ya se mencionó, uno de los resultados más valiosos de la decisión de un caso por la Corte Interamericana, presentado por una ONG, es la cobertura que el caso puede generar en los medios de comunicación. Uno de los autores ya ha señalado antes, basándose en su experiencia como litigante durante años en el sistema interamericano como director de varias organizaciones de derechos humanos en Brasil, que la repercusión de las decisiones interamericanas en ese país ha variado no según su contenido, sino más bien con el grado de presión ejercido por el público y en especial por los medios de comunicación.[114]

A este respecto, las audiencias públicas celebradas por la Corte Interamericana proporcionan un punto focal para atraer la atención de los medios de comunicación, antes, durante y después de que tengan lugar, y pueden reforzar la legitimidad percibida de una causa al servir como foro para que las víctimas y los grupos de la sociedad civil cuenten sus historias y discutan con los Estados demandados. El testimonio persuasivo de las víctimas, en especial, puede dar a las violaciones de derechos un rostro humano y contrarrestar lo que en otro caso sería una percepción negativa de los medios de comunicación o del público sobre ciertos grupos impopulares (como los prisioneros) que son víctimas de las violaciones de derechos humanos.[115] Por lo tanto, sugerimos que la atención de los medios de comunicación inherente a las audiencias públicas puede ayudar a generar apoyo popular y presión para el cumplimiento en torno a un caso.

El establecimiento completo y exacto de los hechos. Como se observó antes, el sistema europeo antes de principios de los años noventa se ocupó sobre todo (cuando no en exclusividad) de violaciones no violentas de los derechos humanos. Además, en muchos casos los hechos no se discutían en gran parte.[116] Por consiguiente, desde el punto de vista histórico, el TEDH no tuvo que dedicar una considerable cantidad de su tiempo a determinar los hechos y, en especial cuando ha estudiado casos contra Estados democráticos consolidados, le ha sido posible muchas veces tomar los resultados de los procesos judiciales nacionales como hechos probados de un caso.[117]

En cambio, en el sistema interamericano las clases de violaciones de derechos humanos han sido en su conjunto más violentas, y es más probable que incluyan patrones complejos con respecto a los hechos, que exijan probar no solo los acontecimientos físicos alegados, sino

también el nivel de conocimiento o participación del Estado en ellos, y también el papel de las autoridades en su investigación. Los Estados demandados han negado muchas veces al menos algunas de las alegaciones de los peticionarios con relación a los hechos, argumentando por ejemplo que una masacre fue en verdad una confrontación entre dos partes armadas o que su investigación de los hechos se hizo de buena fe. Por último, el Estado infractor puede reconocer sin problemas las violaciones específicas alegadas en el caso, pero negar que forman parte de un patrón de violaciones más general (una tendencia que analizamos luego en detalle).

Todavía más relevante es que debido a que el poder del activismo, y no necesariamente los aspectos jurídicos técnicos, influencian en muchas ocasiones la efectividad de una sentencia de la Corte, no es suficiente que la Corte declare que tiene suficientes argumentos jurídicos para encontrar una violación. En lugar de eso, es fundamental que la Corte utilice procesos rigurosos de determinación de los hechos para establecer tanto como sea posible los hechos exactos detrás de la violación, en la medida en que puede ser enorme el nivel de repercusión en los medios de comunicación y en el activismo que tengan las versiones enfrentadas de los hechos (por ejemplo, una versión en la que Estado no protege a la víctima de la violencia de una tercera parte frente a otra en la que el Estado lleva a cabo una ejecución extrajudicial).[121]. En el mismo sentido, al identificar las acciones ilegítimas de sujetos específicos o las deficiencias de instituciones concretas, la Corte puede proporcionar una guía útil para los esfuerzos dirigidos a fortalecer las prácticas de derechos humanos.[122] [...]

Jurisprudencia fundamentada. Una valoración del papel de los tribunales supranacionales en la promoción del respeto por los derechos humanos tiene también consecuencias para el estilo de jurisprudencia que maximizará los efectos de una Corte en la sociedad [...] [;] el grado en el que los activistas nacionales de derechos humanos, [los afines a la causa en el gobierno] y otros puedan hacer uso de una sentencia de la Corte dependerá en general de su relevancia, razonamiento y conciencia de la situación política de un país. En concreto es esencial que la Corte evite (en la medida de lo posible) elementos jurisprudenciales que tenga la probabilidad de causar una reacción negativa del público o el gobierno.

[...]

La necesidad de tener repercusión más allá de los hechos del caso. Por último, todo caso supranacional de derechos humanos debe considerarse como una oportunidad para ejercer presión estratégica en beneficio de una repercusión social amplia [...] [Por lo tanto] la Corte, tanto desde un punto de vista moral como práctico, debe usar cada caso que se le presenta como una oportunidad para promover la cuestión más general que está detrás de la petición ante el sistema.

Con estos principios presentes, realizamos ahora un estudio panorámico de los procedimientos y la jurisprudencia actuales de la Corte Interamericana.

[...]

IV.

[El artículo analiza varios desarrollos recientes en el trabajo de la Corte y evalúa el grado en que cada uno promueve o socava la eficacia del trabajo de la Corte para el activismo de derechos humanos. Las tendencias consideradas son las siguientes:

- El aumento del número de casos resueltos mediante la reducción de las audiencias públicas y las comparecencias de testigos;
- El número creciente de ocasiones en que los Estados reconocen su responsabilidad por las violaciones de derechos humanos alegadas contra ellos;
- La naturaleza de la jurisprudencia de la Corte y la sensibilidad —o la falta de ella— hacia el contexto político local.]

[*Aumento del número de casos resueltos mediante la reducción de las audiencias públicas y las comparecencias de testigos*]

La reducción del uso de audiencias y de testigos por la Corte plantea serias cuestiones sobre el grado en que el testimonio en persona es necesario para establecer de forma plena y exacta los acontecimientos. Mientras que no decimos que la declaración de testigos sea indispensable en todos los casos, nuestro estudio de los procesos judiciales en el sistema interamericano indica que el papel de los testimonios en persona para la determinación de los hechos no siempre puede sustituirse por declaraciones escritas.

[Con respecto a reemplazar los testigos en persona por declaraciones escritas, el artículo señala:]

La parte que propone los testigos puede preferir el testimonio en persona porque es más persuasivo y se entiende con mayor facilidad. En los casos con patrones complejos de los hechos, puede ser esencial presentar testigos que puedan explicar las secuencias detalladas de los acontecimientos o expertos que puedan aclarar los intrincados procesos nacionales. Además, ciertas características del testimonio en persona, como la actitud creíble, solo están disponibles en las audiencias. En *Vélasquez Rodriguez*, por ejemplo, el abogado de los peticionarios destacó la actitud de los tres testigos asociados con las fuerzas de seguridad hondureñas [...]. En *Aloeboetoe v. Suriname*, la Corte basó también parte de su razonamiento en la actitud de testigos, descartando el testimonio de un determinado testigo debido a la "manera en la que testificó, su actitud durante la audiencia y la personalidad que mostró".[176]

[...]

El potencial de que el recorte de los procedimientos orales tenga un efecto negativo en la determinación de los hechos efectuada por la Corte, puede aumentar además en los años venideros, a medida que la región latinoamericana gire cada vez más hacia formas de gobierno democrático. Las autoridades nacionales actuales, al reconocer que mantener la apariencia de un Estado de derecho les conviene, iniciaran actuaciones visibles o las etapas iniciales relativas a la investigación de las violaciones antes de cerrar la investigación o hacer que languidezca con pocas esperanzas de culminarla. Cuando un caso llega a la Corte Interamericana, puede requerir un conocimiento profundo del contexto de los procedimientos nacionales seguidos por las autoridades nacionales con el propósito de determinar si la investigación del Estado se realizó de buena fe. De hecho, la Corte ya decide

un gran número de esta clase de casos, en la que los testigos y el testimonio de expertos pueden ser esenciales para que la Corte valore con precisión los hechos.[180]

Estos argumentos encuentra un apoyo sólido en *Nogueira de Carvalho v. Brazil*, de 2006,[181] un caso muy complejo desde el punto de vista de los hechos relativo a la impunidad por un asesinato en el contexto más general de los asesinatos cometidos por los escuadrones de la muerte [...] Durante varios años, las autoridades brasileñas habían disimulado sus acciones de mala bajo la apariencia de legalidad, haciendo actuaciones como si se investigara y rellenando miles de páginas de expedientes judiciales en el proceso. Solo analizando suficientes pruebas para conseguir una comprensión buena de los procedimientos judiciales y policiales brasileños hubiera sido posible que la Corte apreciara hasta qué punto llegaron las violaciones en el caso.

En consonancia con su práctica habitual reciente, la Corte dedicó un único día a la audiencia pública en el caso *Nogueira de Carvalho*, y combinó su evaluación de la admisibilidad y los méritos del caso en un único proceso. La Corte escuchó el testimonio de solo tres testigos, dos presentados por Brasil y uno solicitado por la Comisión (la Corte rechazó todos los testigos de los peticionarios). En cambio, las partes habían propuesto más de una docena de testigos,[183] entre los cuales había personas que podían testificar sobre actos específicos de las autoridades brasileñas que demostraran las desviaciones del procedimiento policial normal y otros incumplimientos de los requisitos de la Convención Americana.

Después de un único día de audiencia, la Corte dictó una sentencia que no reconocía ninguna violación, y se limitó a declarar que los peticionarios y la Comisión no habían mostrado suficiente evidencia como para determinar que Brasil no hubiera investigado de buena fe el asesinato de Gilson Nogueira. Esta decisión es contraria al análisis de varios órganos públicos brasileños y grupos de la sociedad civil,[184] y también de organizaciones internacionales de derechos humanos,[185] que coincidían en señalar que los agentes del Estado fueron responsables de la muerte de Nogueira y que la posterior investigación no se realizó seriamente con la intención de aclarar los hechos o de castigar a los responsables.

[El artículo explica que la sentencia de la Corte significó un considerable retroceso para los activistas de los derechos humanos y el activismo de derechos humanos en Brasil]

[...]

Sin embargo, a la vista de lo anterior las ganancias aparentemente sustantivas producto del enjuiciamiento de un mayor número de casos serán ficticias si en algunos casos complejos se pierden de vista hechos cruciales y se llega a conclusiones dudosas sobre los hechos, y eso tiene consecuencias negativas para la protección de los derechos humanos en la sociedad.

a. Darle la vuelta al sistema: el reconocimiento de responsabilidad por parte de los Estados

Otra sorprendente tendencia del litigio ante el sistema interamericano en los últimos pocos años ha sido el creciente número de casos en los que el Estado reconoce su responsabilidad por las violaciones de derechos humanos alegadas contra ellos. El reconocimiento de la responsabilidad, o allanamiento a las pretensiones, como se denomina en el sistema, puede hacerse antes o después de la etapa de fondo del caso (a veces tiene lugar durante las

audiencias públicas convocadas para el estudio contencioso del fondo del caso). Para allanarse, el Estado declara que acepta la responsabilidad internacional por la totalidad o parte de las alegaciones de la Comisión o los peticionarios. El caso puede pasar entonces al estudio contencioso de las alegaciones que todavía estén en disputa o pasar directamente a la determinación de las reparaciones debidas.

Si bien los allanamientos se dieron ocasionalmente durante los noventa (antes del año 2000, hubo seis casos con allanamiento total o parcial), eran la excepción a la regla; pero en los últimos cinco años, el número de Estados que han adoptado este enfoque ha aumentado fuertemente (véase el gráfico 5). Sólo en el año 2006, hubo diez casos en los que se produjo un allanamiento parcial o total, lo que supuso el 60 por ciento de los casos resueltos por la Corte. De las sentencias publicadas en 2007, la Corte clasifica el 80 por ciento de ellas como decisiones que implican alguna forma de allanamiento.[188]

Causa de preocupación: los allanamientos tras las negaciones de la responsabilidad. Una indicación clara de que los allanamientos no siempre representan un mayor compromiso con los derechos humanos es el uso estratégico de ese reconocimiento solo después de que hayan fracasado los esfuerzos de un Estado por que el caso no se admita (o por ganarlo con argumentos de fondo). [...]

[...]

Los informes disponibles sobre cumplimiento revelan que los numerosos allanamientos sufren de los mismos tipos de problemas de cumplimiento que los casos contenciosos, especialmente con respecto a las deficiencias de los Estados a la hora de investigar y enjuiciar a los violadores de derechos humanos. Este resultado apoya la perspectiva de que, como mínimo, los allanamientos no implican por fuerza un mayor compromiso del Estado para reparar y prevenir las violaciones de los derechos humanos que las actuaciones contenciosas del Estado en todas las fases del proceso.

Volver las tornas con respecto al avergonzamiento internacional. Al ofrecerse al allanamiento, los Estados han sido capaces de abreviar los procesos contra ellos, reducido los testimonios de los testigos y en algunos casos evitar totalmente las audiencias ante la Corte (aspectos que analizamos con mayor profundidad después). [...]

Además, más allá de evitar la publicidad negativa, los allanamientos les permiten a los Estados reestructurar el entorno de la Corte y obtener un mayor control sobre él, al usarlo como un foro para proyectar la imagen de ser democracias respetuosas de los derechos humanos. Esta dinámica se puede ver con claridad cuando los Estados se allanan durante las audiencias públicas. En el caso *Retén de Catia*, por ejemplo, a pesar de un intento inicial de retractarse de su allanamiento y de sus alegaciones iniciales defendiéndose ante la Corte, Venezuela declaró durante la audiencia de fondo que se presentaba ante la Corte para "honrar la memoria de los que han muerto, reconocer la verdad y buscar justicia".[201] El gobierno se dirigió también a las víctimas presentes en la sala de audiencias, y afirmó que había venido a "reconocer y reparar todo el dolor que habéis sufrido".[202] En el mismo caso, uno de los miembros de la familia de las víctimas que estaba presente quiso dirigirse a la Corte, pero no se le dio la oportunidad de hablar.[203]

[...]

El exmagistrado Antônio Augusto Cançado Trindade ha analizado [la] dinámica [de reducir el testimonio de testigos] con gran preocupación, y ha argumentado que la decisión de la Corte de no celebrar una audiencia en el caso de 2006 de *Servellón García v. Honduras* a la luz del allanamiento parcial del Estado (pero descontextualizado) reflejaba "la prisa actual ilógica para decir el mayor número de casos en un tiempo record" y había "privado [a la Corte] de elementos que hubieran enriquecido su sentencia".[221]

b. Influencias desde arriba y desde abajo: las tendencias en la jurisprudencia de la Corte Interamericana

[…]

Promover frente a legalizar en exceso los derechos humanos. Laurence Helfer proporciona un marco detallado para comprender la reacción negativa de los gobiernos en respuesta a la jurisprudencia supranacional. En concreto, Helfer analiza un estudio de caso del Caribe en el que un órgano supranacional, el Comité Judicial del Consejo Superior (el órgano de apelación superior con jurisdicción originaria sobre la colonias británicas) ordenó a los Estados del Caribe sujetos a su jurisdicción que reformaran sus procesos de pena de muerte asegurándose de que todas las apelaciones nacionales e internacionales sobre sentencias de muerte se resolvieran en un plazo de cinco años.[226] La situación llevó a una "abolición casi de facto de la pena de muerte" puesto que los mecanismos de apelación disponibles, incluido el uso del sistema interamericano, requerían a menudo de más de cinco años para completarse.[227] La conmutación correspondiente de numerosas sentencias de muerte provocó tal resistencia nacional que Trinidad y Tobago retiró su ratificación de la Convención Americana para impedir peticiones adicionales al sistema interamericano[228] y procedió a ejecutar a varios acusados en desafío a las órdenes de la Corte Interamericana.[229] A partir del estudio de este caso, Helfer argumenta que cuando una decisión supranacional impone nuevas o más costosas obligaciones al Estado que la previstas por este cuando rarifico el tratado en el que se establecían los derechos y deberes relevantes (un situación que llama "exceso de legalización"), es más probable la resistencia a la decisión supranacional.[230] Entre las razones exactas por las cuales el exceso de legalización de los órganos de derechos humanos produce una reacción negativa, Helfer subraya el papel de la presión nacional para explicar la resistencia a la jurisprudencia supranacional.[…]

[…]

[El artículo examina a continuación las circunstancias en las que la Corte Interamericana podría promover los intereses de los derechos humanos o, en sentido contrario, conducir a situaciones de "exceso de legalización"]

La influencia del clima nacional en la aceptación de la jurisprudencia supranacional. Un contexto en el que pueden observarse los efectos positivos de la jurisprudencia de la Corte sería el relativo a la invalidez de las leyes de amnistía en la región. El tema de las leyes de amnistía se planteó por primera vez ante el sistema interamericano a través de una serie de peticiones en la década de los ochenta. En 1992 la Comisión declaró que las leyes de amnistía argentinas y uruguayas contradecían las obligaciones de derechos humanos de esos Estados.[237] Sin embargo, en el periodo que siguió a las transiciones de esos Estados de un

gobierno militar a uno civil, el gobierno argentino y uruguayo consideraron las leyes de amnistía como herramientas políticas para garantizar la estabilidad.

En respuesta a las decisiones de la Comisión, Argentina y Uruguay solicitaron una opinión consultiva de la Corte Interamericana (Opinión Consultiva OC-13),[238] y se alegó que la Comisión carecía de competencia para tomar decisiones sobre la validez de la legislación nacional. La Corte declaró que la Comisión tenía esa clase de competencia,[239] pero que el clima político en los países relevantes seguía siendo hostil a la visión del sistema sobre las leyes de amnistía.

Sin embargo, en el año 2001 la Corte enfrentó un clima político muy diferente cuando estudió el caso *Barrios Altos v. Perú*,[240] un caso de masacre en el que la Corte declaró que la ley de amnistía de Perú era inválida. Esta decisión siguió a acontecimientos recientes en Perú (en especial a la caída del régimen de Alberto Fujimori) y tuvo una repercusión inmediata en el país. Human Rights Watch informó que "pocos días después de que se tomara la decisión, la policía peruana detuvo a varios presuntos miembros del escuadrón de la muerte Colina, acusados de asesinato, entre los que estaban dos exgenerales [...] En octubre, el Consejo Supremo de Justicia Militar anuló su decisión de aplicar las leyes de amnistía a los casos Barrios Altos y La Cantuta".[241]

Además, la decisión contribuyó a los progresos de los derechos humanos en el continente. Por ejemplo, la Corte Suprema de Argentina citó la decisión *Barrios Altos* cuando declaró inconstitucional las leyes de amnistía del país en 2005.[242] En el mismo sentido, en el caso *Almonacid Arellano*,[243] los peticionarios impugnaron la validez de la ley de amnistía de Chile y se beneficiaron del precedente *Barrios Altos*. Aunque la decisión *Almonacid Arellano* enfrentó resistencia por parte de algunas instituciones,[244] el presidente de Chile declaró que había que implementar la sentencia,[245] y la Corte Suprema citó poco después la decisión, y también *Barrios Altos*, cuando declaró que la normas legales nacionales no podían utilizarse como obstáculos que impidieran acusar ante los tribunales a los autores de graves violaciones de los derechos humanos.[246] Por consiguiente, las sentencias de la Corte Interamericana le dieron apoyo a los esfuerzos en curso de los miembros de la sociedad chilena, entre los que estaban los de importantes cargos del Estado, para limitar los efectos de la amnistía.

Como demuestran estos ejemplos, la repercusión positiva de la jurisprudencia de la Corte sobre leyes de amnistía surge en gran parte del hecho de que el panorama político del Cono Sur ha cambiado radicalmente desde los primeros casos sobre leyes de amnistía resueltos por la Comisión. Los procesos internacionales contra Augusto Pinochet iniciados en Europa a finales de 1998; los esfuerzos de los jueces, los órganos legislativos y los grupos de la sociedad civil nacionales por invalidar las leyes de amnistía, y la distancia creciente entre el gobierno actual y los anteriores, han sido todos ellos elementos que han contribuido a un clima en el que la invalidación de la amnistía ha podido conseguir apoyo público e institucional.[247]

[...]

La principal conclusión que cabe extraer de estos estudios de caso es que las decisiones de la Corte tendrán un fundamento firme, aun aquellas innovadoras, o que requieren cambios de política pública o encuentran resistencia por parte de los sujetos afectados, cuando se

entrelazan con desarrollos paralelos de la sociedad civil y una comprensión social amplia de un determinado asunto. [...]

En cambio, en algunas sentencias recientes la Corte ha elaborado opiniones que cabría decir que muestran una atención desproporcionada a expandir la jurisprudencia en la esfera internacional, sin tener en cuenta plenamente las realidades sociales y políticas que dificultan el progreso de los derechos humanos en cuestión. En línea con nuestros argumentos previos, estas clases de decisiones han provocado a veces resistencia por parte de los Estados.

¿Avanzada para su tiempo o desfasada? Opinión consultiva OC-18. Un ejemplo destacado de los intentos de la Corte para promover una jurisprudencia visionaria sería el de la Opinión Consultiva OC-18, de 2003, titulada *Condición jurídica y derechos de los migrantes indocumentados*.[251] Esta opinión se elaboró a partir de una solicitud de México para que se aclararan las obligaciones de los Estados con respecto a los trabajadores indocumentados tras una sentencia de 2002 de la Corte Suprema de Estados Unidos por la que un empleado indocumentado de México, despedido en venganza por haber organizado un sindicato, no era elegible para recibir una indemnización equivalente a los salarios no pagados del National Labor Relations Board.[252] La principal cuestión que presentó el gobierno mexicano era si era admisible negar ciertas protecciones a los trabajadores por razón de su condición migratoria irregular.[253]

La Corte había decido esa cuestión antes con el fundamento de que ciertos derechos laborales son fundamentales (como se defendió por la Comisión)[254] y que entre estos está el derecho de los trabajadores a obtener una compensación plena por el despido injusto a causa de actividades sindicales, con independencia de su condición migratoria. Sin embargo, esta vez, la Corte, en vez de hacer eso, estructuró su razonamiento a partir de un marco general y filosófico de no discriminación. La opinión consultiva comienza analizando la naturaleza del derecho a la igualdad; un derecho que, según señala la Corte, "surge directamente de la unidad de la familia humana".[255] Después de ese tono revolucionario, la Corte declaró en un paso sin precedentes que la no discriminación sin distinción de fundamento había adquirido la posición de *ius cogens* en el derecho internacional.[256]

La Corte manifestó a continuación que todos los trabajadores, con independencia de su condición migratoria, tenían derecho a todas las protecciones laborales previstas en el derecho nacional, internacional y local.[257] La Opinión Consultiva OC-18 representa por consiguiente la jurisprudencia más progresista hasta la fecha sobre los derechos laborales de los emigrantes indocumentados.[258] Su carácter novedoso se ha reconocido por varios académicos de este campo de estudios, que declaran que "va mucho más allá de los pronunciamientos existentes".[259] En su aclaración de voto, el magistrado Cançado Trindade señala que es "de gran transcendencia" y "pionera".[260] Sin duda, la decisión de la Corte concede un mayor rango de derechos a los trabajadores emigrantes indocumentados que la Convención Internacional sobre la Protección de los Derechos de todos los Trabajadores Migratorios y de sus Familiares.[261] En esta Convención, ciertos derechos, (incluido el derecho a fundar sindicatos), se aplica solo a los trabajadores que estén documentados o en situación regular.[262]

A la vista de los elevados requisitos para que una norma se reconozca de *ius cogens*,[263] parece improbable que una norma que prohíbe negar cualquiera de las protecciones laborales a los trabajadores indocumentados pudiera ser un precepto con respecto al cual

haya acuerdo universal.[264] En consecuencia, esta decisión corre el riesgo de debilitar la relevancia y las posibilidad de cumplimiento percibidas de la decisión de la Corte en los países que todavía están lejos de reconocer esta norma.[265]

[…]

Tampoco la Opinión Consultiva OC-18 ha conseguido todavía claras mejoras en el trato de los trabajadores migrantes en la región. De hecho, las leyes laborales de México, el país que solicitó la opinión consultiva, continuaron prohibiendo a los no mexicanos tener posiciones de liderazgo en los sindicatos.[267] En conjunto, por lo tanto, la opinión puede reflejar una Corte centrada en una visión idealizada del derecho de los derechos humanos en lugar de en una jurisprudencia más relevante para el campo difícil y muchas veces impopular a nivel nacional de los derechos de los trabajadores emigrantes.[268]

Más perjuicios que beneficios: la reacción adversa a órdenes de compensación políticamente impopulares. A lo largo de los años, la Corte ha expandido mucho su jurisprudencia en otra área: el contenido de sus órdenes de reparación a los Estados. En particular, la inclusión de la Corte de medidas simbólicas de reparación como elemento regular de sus sentencias es una característica progresista que va más allá de los precedentes de otros tribunales, como por ejemplo el Tribunal Europeo. Además, estas reparaciones simbólicas se han hecho más detalladas y variadas en los últimos años. […]

Un caso que subraya las consecuencias potencialmente negativas de la jurisprudencia que choca con las condiciones nacionales es *Penal Miguel Castro Castro v. Perú*. En este caso, la Corte consideró las muertes de docenas de prisioneros y los abusos contra cientos más en la cárcel de Castro Castro,[269] producto de ataques de motivación política contra un sector particular de la población carcelaria. Los ataques se dirigieron contra los detenidos del pabellón asociado con Sendero Luminoso, un movimiento nacional identificado por el público peruano como grupo terrorista.[270]. Además de las órdenes de reparación, la Corte le ordenó al Estado peruano añadir los nombres de las víctimas a un monumento conocido como El Ojo que Llora,[271] que en la actualidad tiene los nombres de 40.000 personas que murieron en el conflicto interno de Perú entre 1980 y 2000, inscritos en pequeños cantos rodados en torno a una escultura central; entre las víctimas de la violencia política están policías, militares y civiles.

La orden de incluir a terroristas presuntos y condenados un el monumento dedicado en gran parte a recordar a las víctimas del terrorismo produjo una enorme reacción negativa política y social.[272] Las familias de las personas cuyos nombres ya estaban en el monumento expresaron su conmoción, mientras que el presidente peruano Alan García se sumó al clima de indignación al rechazar vigorosamente la sentencia en general por ser “ofensiva” y la uso como una plataforma para condenar el terrorismo y describir a la Corte como una institución remota, sin conocimiento ni autoridad moral para dictar una decisión como esa.[273] Durante el año siguiente, el debate acerca de que el monumento hiciera honor a terroristas (avivado por las noticias posteriores de que al menos algunos nombres ya estaban allí)[274] llegó a tal punto que se inició una campaña popular para demolerlo y fue objeto de actos vandálicos, lo que despertó temores de violencia y obligó a las organizaciones de derechos humanos nacionales a organizar una campaña de defensa pública del monumento.[275] Tuvo consecuencias mucho más profundas el discurso intolerante, de sesgo nacionalista, provocado por la sentencia que el debate mismo en torno al monumento.

Los efectos negativos, si bien importantes en grado, no eran totalmente imprevisibles. Aunque las órdenes de reparación incluyen muchas veces alguna forma simbólica de reparación, esta orden específica de reparación se ubica dentro de una categoría más invasiva, ya que manda alterar un monumento existente para incluir los nombres de personas pertenecientes a un grupo políticamente impopular [...]. Una evaluación más cuidadosa de los efectos probables de dictar esa orden habría llevado a la Corte a evitar dictar esa forma de reparación simbólica. De hecho, en el momento de enviar este artículo a publicación, y después de recibir argumentos escritos adicionales del gobierno peruano, la Corte modificó su orden de reparación para permitirle a Perú construir un nuevo parque o monumento en lugar de inscribir los nombres de las víctimas del caso *Penal Miguel Castro Castro* en El Ojo que Llora.[276]

Sentencias simplificadas: una oportunidad de concentrarse en los hechos. Un desarrollo positivo sería el reconocimiento que la Corte hizo en el año 2007 de que necesita que jurisprudencia sea más accesible. En especial, desde el año 2007 la Corte tomó la iniciativa original de utilizar un formato más simple para sus sentencias. En su página de internet, la Corte explica que su decisión de modificar el formato de sus sentencias "surge de las solicitudes que la Corte ha recibido de Estados miembros, [...] universidades y académicos de la región, entre otros, y también de su propia reflexión sobre el asunto".[277] El anuncio añade que "El nuevo formato reduce la longitud de las sentencias [...] El tiempo dirá si [los cambios en la estructura de las sentencias de la Corte] afectará su repercusión en los medios de comunicación o las nuevas sentencias de la Corte tendrán otros efectos.[283]

[...]

CONCLUSIÓN: MIRAR MÁS ALLÁ DE LAS AMÉRICAS Y MÁS ALLÁ DE LA SALA DE AUDIENCIAS

[...]

[...]A medida que el panorama de derechos humanos en el sistema europeo se aproxima al contexto de las Américas y según la Corte Africana se prepara para comenzar su trabajo, creemos que el modelo de litigio supranacional y de promoción de los derechos humanos aplicable a la Corte Interamericana será cada vez más relevante en otras partes del mundo. Animamos a los académicos y practicantes que trabajan en todos los sistemas a considerar los procesos de cambio de los derechos humanos más adecuados para las diferentes regiones y países, y también a indagar cómo los mecanismos regionales o internacionales de derechos humanos pueden contribuir de forma más efectiva a estos procesos. En nuestra opinión, es comprendiendo estos procesos únicos de cambio y respondiendo a ellos que los tribunales supranacionales pueden maximizar las posibilidades de que el ideal de las decisiones judiciales sobre derechos humanos se refleje en mejoras sustantivas en las vidas no solo de los peticionarios de sus sistemas, sino en el universo mucho más grande de personas que nunca estarán en la sala de audiencias de un tribunal supranacional.

TRADUCCIÓN DE:

NEVER AGAIN? THE LEGACY OF THE ARGENTINE AND CHILEAN DICTATORSHIPS FOR THE GLOBAL HUMAN RIGHTS REGIME, JOURNAL OF INTERDISCIPLINARY HISTORY, VOL XXXIX (AUTUMN 2008), P. 233-244.

¿NUNCA MÁS? EL LEGADO DE LAS DICTADURAS ARGENTINAS Y CHILENAS PARA EL RÉGIMEN GLOBAL DE DERECHOS HUMANOS

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Thomas C. Wright. *State Terrorism in Latin America: Chile, Argentina, and International Human Rights* (Lanham, Rowman & Littlefield, 2007).

Sonia Cárdenas. *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia, University of Pennsylvania Press, 2007).

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Durante las tres décadas precedentes, los derechos humanos han pasado de situarse en la periferia de los intereses políticos a ser parte del discurso usual, en especial en Latinoamérica. En las relaciones internacionales, y en el discurso político interno de muchos Estados, los derechos humanos se han convertido en un asunto primordial, incluso dominante. Este aparente éxito del movimiento de los derechos humanos hace difícil apreciar el panorama bastante diferente que predominaba hace más de treinta años. En 1975, solo había entrado en vigor uno de los ocho tratados principales de derechos humanos

aprobados por Naciones Unidas. [31] Solo dos Estados habían ratificado el tratado más importante sobre derechos en las Américas, la Convención Americana de Derechos Humanos. Desde entonces, la gran mayoría de los Estados del mundo han ratificado una variedad de tratados universales, y también de convenios regionales internacionales, que se ocupan específicamente de una amplia gama de derechos individuales y crean órganos de vigilancia. En Latinoamérica, la ratificación de algunos de estos tratados es casi universal. Treinta de los treinta y cuatro miembros activos de la Organización de Estados Americanos han ratificado ya el Pacto Internacional de Derechos Civiles y Políticos, veinticuatro han ratificado la Convención Americana de Derechos Humanos y veintiuno han aceptado también la jurisdicción obligatoria de la Corte Interamericana de Derechos Humanos.

Desde la perspectiva del cumplimiento de las normas de derechos humanos, Otro progreso reciente es el establecimiento por Naciones Unidas de los tribunales penales internacionales (TPI) para Ruanda y la antigua Yugoslavia, al igual que tribunales parecidos creados en respuesta a otras situaciones de atrocidades masivas. Los TPI son los primeros tribunales de esa clase desde que se constituyeron los tribunales de Núremberg y Tokio hace medio siglo. En el 2002, la comunidad internacional fue todavía más lejos al establecer la Corte Penal Internacional (CPI), el primer tribunal permanente y supranacional para juzgar violaciones graves de los derechos humanos fundamentales, entre otros asuntos.

Sin embargo, a pesar de ese progreso normativo destacable, ha habido relativamente pocos cambios con respecto a los medios para obligar a los Estados recalcitrantes a aceptar los derechos más básicos de sus ciudadanos. Hoy, como antes, son los factores nacionales y los grupos activistas locales, mucho más que las presiones o los tratados internacionales, las principales fuerzas motoras para motivar a los Estados a respetar los derechos humanos. La presión internacional puede ser importante como estímulo para el cambio, pero su repercusión en las prácticas de los Estados individuales está limitada en gran medida por las condiciones políticas nacionales. Incluso la CPI, que es una institución que promete aplicar la justicia supranacional a los violadores de derechos, funciona bajo el principio de complementariedad, que autoriza a la Corte a intervenir cuando el Estado en el que se encuentra el acusado no puede o no tiene la voluntad de procesarlo judicialmente, y solo en ese caso. Esta restricción, sumada a otras, hace que el juzgamiento de violaciones por la CPI sea la excepción a la regla básica del cumplimiento de los derechos humanos: la solución nacional del problema (incitada, tal vez, por la presión internacional) o la falta de solución en absoluto.[32]

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[31] La Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial entró vigor el 4 de enero de 1969.

[32] La CPI tiene jurisdicción internacional sobre el genocidio, los crímenes de lesa humanidad y los crímenes de guerra después del 1 de julio de 2002, fecha en la que el Estatuto de Roma para la CPI entró en vigor, pero solo cuando estos crímenes se cometen en el territorio de un Estado que es parte del Estatuto de Roma o por uno de sus nacionales, a menos que la situación se remita al conocimiento del Fiscal Especial de la CPI por el Consejo de Seguridad de Naciones Unidas, o el Estado acepte voluntariamente la jurisdicción de la CPI. Véase ICC, "The ICC at a Glance", disponible en http://www.icc-cpi.int/library/about/ataglance/ICCAtaglance_en.pdf. Desde consideraciones más prácticas, las limitaciones de financiación restringen todavía más el ámbito potencial del trabajo de la ICC.

Si se tienen en cuenta estas limitaciones, la pregunta para los que buscan promover la defensa de los derechos sería: ¿Bajo qué clase de presión internacional es probable que los Estados reduzcan los abusos a los derechos? Para responder a esta pregunta, los académicos han dirigido su atención a la experiencia del Cono Sur de Latinoamérica a la vista de su historia de dictaduras militares y de activismo en el campo de los derechos humanos.

Hay dos libros de reciente publicación, el primero de Thomas Wright, *State Terrorism in Latin America*, y el segundo de Sonia Cárdenas, *Conflict and Compliance*, que han considerado ese problema en el contexto de los regímenes represivos que oprimieron brutalmente a Chile y Argentina durante las décadas de los años setenta y ochenta. Los dos relatos son parecidos en cuanto a sus aspectos más generales; describen la influencia, a menudo limitada, que los activistas de derechos humanos tuvieron en las prácticas de esas dictaduras. Pero las conclusiones finales que extraen esas obras con respecto al potencial de los mecanismos internacionales de derechos humanos para prevenir abusos futuros difieren en aspectos destacables.

Wright proporciona una visión general profunda del terror organizado por el Estado en Chile y Argentina durante las décadas de los años setenta y ochenta. En un orden más o menos cronológico, analiza los factores políticos que llevaron a la aparición de las dictaduras en esos países; las técnicas de represión y manipulación que facilitaron su continuidad en el gobierno, y el largo proceso, todavía en curso, de justicia transicional en cada sociedad. Examina también las luchas de las organizaciones sociales de base que se desarrollaron en ambos países para defender los derechos humanos, para lo cual explora cómo los activistas nacionales han intentado llevar ante la justicia a los violadores de derechos humanos, desde los primeros tiempos de las dictaduras hasta nuestros días. Un propósito más ambicioso del autor es seguir el crecimiento del movimiento internacional de derechos humanos desde lo que cabría denominar como su primer gran reto global —el golpe de Estado de 1973 en Chile y los abusos atroces del régimen de Pinochet— hasta el 2006. Defiende que los casos del Cono Sur ayudaron a configurar el sistema actual de derechos humanos de tal forma que hoy han aumentado las posibilidades de detener las acciones de los violadores potenciales.

Las cuestiones que examina Cárdenas se traslapan con las que preocupan a Wright en cierta medida, pero Cárdenas se concentra principalmente en la relación causal (en la medida en que exista) entre la presión internacional y el cambio en los Estados en los que se producen abusos de derechos humanos. Encuentra que la presión internacional tiene una capacidad bastante limitada para modificar las prácticas nacionales, que, en su opinión, responden mucho más a factores políticos locales. En consecuencia, su análisis lleva a una visión menos optimista sobre las perspectivas de promover los derechos humanos recurriendo principalmente a los canales internacionales.

EL TERRORISMO DE ESTADO Y LA EVOLUCIÓN DEL CUMPLIMIENTO DE LOS DERECHOS HUMANOS. En *State Terrorism*, Wright recoge con exactitud varios casos en los que la presión en torno a los derechos humanos ha tenido correlación con mejores prácticas en el Cono Sur. Sin embargo, a pesar de esos ejemplos las explicaciones que da el libro sobre la capacidad actual del sistema de derechos humanos de influenciar el comportamiento estatal parecen ser demasiado optimistas. En concreto, al colocar su relato en una progresión que en general es lineal (aunque no totalmente), por que va de una "etapa de vigilancia" a una "etapa de cumplimiento", Wright no le da suficiente peso a los aspectos más sombríos de los acontecimientos de los que está haciendo la crónica. Aunque sin duda el

reconocimiento internacional de las normas de derechos humanos ha mejorado, y ha ido acompañado de progresos manifiestos en los esfuerzos por hacer responsables a algunos violadores de derechos por las atrocidades masivas que cometieron, la capacidad básica de los mecanismos internacionales de derechos humanos para disuadir y castigar las violaciones en la esfera mundial sigue siendo relativamente baja. De hecho, tanto la literatura académica reciente como la incidencia actual de los abusos que tienen lugar en todo el mundo sugieren que la capacidad y la voluntad del sistema global de limitar y castigar las violaciones de derechos no ha avanzado demasiado en las últimas tres décadas. Como pasó en el Cono Sur en la década de los setenta, los cambios en las prácticas de derechos humanos continúan estando impulsadas, más que por la presión internacional, por las fuerzas políticas nacionales y la capacidad de los grupos locales para utilizar de forma efectiva el discurso de los derechos humanos.

LAS DICTADURAS DEL CONO SUR: ¿DE CRISIS DE LOS DERECHOS HUMANOS A UNA REVOLUCIÓN DE LOS DERECHOS HUMANOS? Wright comienza con un panorama general de los tratados internacionales de derechos humanos, los órganos de vigilancia y los tribunales de crímenes de guerra, partiendo del periodo posterior a la Segunda Guerra Mundial y terminando en tono triunfal con el establecimiento de la CPI. Tras establecer este amplio marco, estudia la crisis extendida de derechos humanos que padeció gran parte de Latinoamérica en los años siguientes a la Revolución cubana, y explica cómo los gobiernos de la región reaccionaron a la amenaza, real o imaginada, de que los grupos políticos de izquierda dentro de sus fronteras siguieran el ejemplo cubano. Sus estrategias políticas produjeron regímenes militares propiamente dichos o de facto, y graves violaciones de los derechos humanos en países en los que vivía la mayoría de la población de la región (p. 18).

La mayor parte del libro de Wright es un relato detallado de la dictadura chilena y argentina. Sus descripciones convincentes del ascenso al poder de esas dictaduras, el desarrollo de sus estructuras y sus abusos sistemáticos proporcionan un excelente panorama general de este periodo, en especial para aquellos que son nuevos en este campo. Los que ya están familiarizados con los mecanismos de la violaciones de derechos humanos de estos gobiernos encontrarán que el análisis de Wright sobre los factores políticos y sociales detrás los golpes de Estado iniciales y que contribuyeron al apoyo recibido por esos regímenes en el largo plazo proporciona un nivel adicional de análisis para comprender el clima nacional en esa época.

Wright estudia a continuación los progresos y retrocesos en los esfuerzos contemporáneos por llevar ante la justicia a los funcionarios del gobierno responsables por la guerra sucia, es decir, por las violaciones de derechos humanos. Al analizar estos procesos, entre los cuales estarían los factores que influencian la opinión pública nacional a favor o en contra de la responsabilidad de esos funcionarios por sus acciones, una vez más Wright ofrece un relato detallado que se lee con facilidad (aunque, como reconoce, ya existe una importante cantidad de obras académicas sobre este tema).[33]

La narración de Wright ambiciona hacer un aporte novedoso con respecto a las obras académicas existentes a través de su análisis de la relación recíproca entre los regímenes de Chile y Argentina y el desarrollo del sistema internacional de derechos humanos (p. 15). Se

[33] Entre las obras académicas previas, véase en particular Naomi Roht-Arriaza,*The Pinochet Effect:Transnational Justice in the Age of Human Rights* (Philadelphia, 2005).

concentra en el papel que tienen los órganos intergubernamentales e internacionales de derechos humanos a la hora de exponer públicamente y presionar a las dictaduras militares del Cono Sur, y también en cómo la estructura y la actividad de estos órganos de derechos humanos evolucionó a medida que respondieron a la situación chilena y argentina. Wright concluye que la interacción de estas instituciones con los dos regímenes del Cono Sur llevó al desarrollo de estándares de derechos humanos cada vez más duros y, lo que es más importante, de "las herramientas necesarias para hacer cumplir esos estándares", fortaleciendo así el sistema internacional de derechos humanos en formas que tuvieron repercusión mucho más allá del Cono Sur (pp. 32, XV).

El panorama general introductorio de Wright sobre la evolución del marco internacional de derechos humanos parece apoyar su tesis. Describe el ascenso del sistema internacional desde los años setenta, cuando las normas eran "incompletas y literalmente no se habían ensayado", pasando por una "etapa de cumplimiento" intermedia, para llegar por último a la "era de los derechos humanos" actual (p. 225).[34] En concreto, Wright celebra la creación de la CPI como "el mayor paso tomado hasta ahora para hacer que los tratados internacionales de derechos humanos se cumplan en la práctica" (p. 13). De no interferir con éxito Estados Unidos, Wright anticipa que la CPI puede dar lugar a "un nuevo orden mundial en el que existan medidas preventivas efectivas contra los crímenes contra la humanidad" (pp. 13-14).

Sin embargo, a pesar de los progresos claros en el marco de los derechos humanos, hay razones para dudar de esa caracterización optimista del poder potencial del régimen global de derechos. Muchas de esas razones para el escepticismo se hacen evidentes en el análisis de Wright sobre las condiciones políticas nacionales durante las dictaduras del Cono Sur. Deshacer las conexiones de su tesis entre los acontecimientos en el Cono Sur y el potencial preventivo de los mecanismos actuales de derechos humanos requiere de una perspectiva crítica acerca de los resultados específicos de la presión en torno a los derechos humanos en el Cono Sur y también acerca de la exactitud de la valoración que hace Wright de la maquinaria global actual de derechos humanos. Wright tiene razón cuando dice que la dictadura chilena y argentina dejaron su sello en la estructura y los métodos del movimiento actual de derechos humanos y que ese movimiento fue valioso para los progresos nacionales en esos países. No obstante, su evaluación del poder del sistema global resultante para prevenir futuras atrocidades mediante la amenaza de la judicialización internacional tiene un menor apoyo a partir de los datos disponibles.

Las características de las dictaduras chilena y argentina, y las violaciones típicas de derechos humanos que allí se cometieron, al igual que las de otros regímenes autoritarios en otros lugares, influencian sin duda el contenido de las normas de derechos humanos, como puede verse, por ejemplo, en la redacción de los tratados de Naciones Unidas e interamericanos que se ocupan específicamente de la desaparición forzada (p. 125). La situación en Chile contribuyó especialmente a la hora de proporcionar un impulso para que los órganos internacionales de derechos humanos refinaran o expandieran sus actividades de

[34] En otros lugares del libro, Wright formula estas conclusiones de una forma menos ambiciosa: [La influencia de los casos chileno y argentino] podría posiblemente influencia a los potenciales represores en cualquier parte del mundo antes de que actúan, y de esa forma modesta contribuir a empujar el régimen de derechos humanos hacia otra etapa de su evolución: la etapa de prevención" (p. 232)

vigilancia y para que se acometieran varias investigaciones detalladas y se produjeran condenas duras de las prácticas de derechos humanos durante esa época (p. 75).

Wright señala también varios casos en cada país en los que el activismo internacional de derechos humanos (por ejemplo, un informe de la Comisión Interamericana de Derechos Humanos) coincidió con una mayor oposición pública a los abusos de derechos humanos y a mejores en las prácticas de los regímenes. En esos casos, la vigilancia, la redacción de informes, las visitas, etcétera, efectuadas con rigor por los órganos internacionales, producía en muchas ocasiones mayores oportunidades de activismo para los activistas nacionales, que podía ser capaces de desplegar efectivamente en momentos estratégicos estas actividades para generar oposición pública a las prácticas del gobierno. A este respecto, Keck y Sikkink describen la evolución de las prácticas dictatoriales militares en Argentina explicando su teoría del boomerang de la influencia internacional en las situaciones nacionales de derechos humanos (p. 107).[35] Según esta teoría, en la esfera global los activistas nacionales emplean aliados internacionales para avergonzar públicamente y presionar a un gobierno, con lo que las propias demandas del grupo nacional se amplifican y en última instancia sirve para "devolver esas demandas a la esfera nacional".[36]

Sin embargo, y sin perjuicio de la contribución innegable y positiva del sistema internacional emergente de derechos humanos a los esfuerzos nacionales en Chile y Argentina, concluir que el sistema de derechos humanos ha alcanzado el punto en el que puede desencadenar mayores niveles de protección de los derechos humanos o de responsabilidad ante la sociedad por su violación minimiza las restricciones persistentes a esas respuestas.

En primer lugar, es necesario determinar sistemáticamente cuándo y cómo la presión internacional en torno a los derechos humanos puede causar un cambio fundamental en las prácticas de un Estado. El estudio de Cárdenas sobre las interacciones entre la dictadura chilena y argentina y el sistema internacional de derechos humanos, complementado por sus análisis estadísticos de 172 países durante un periodo de cinco años en la década de los noventa, proporciona datos para un análisis más completo de esta cuestión. Aunque reconoce que la presión internacional condujo a prácticas de derechos humanos mejores en Argentina y Chile durante la década de los setenta (p. 65), destaca que esa influencia tiende a disiparse frente a los factores nacionales compensatorios. Señala que si bien Argentina se comprometió públicamente con las normas internacionales en 1977, sus agentes de seguridad desaparecieron forzosamente a más de 3000 personas ese año y el gobierno abrió cuatro nuevos centros clandestinos de detención (p. 69). En Chile, los sicarios de Augusto Pinochet intensificaron el uso de la tortura en 1979 y 1980, a pesar de las críticas crecientes de la comunidad de derechos humanos (pp. 67-68). Este patrón demuestra que aunque un régimen puede estar dispuesto a tomar medidas cosméticas, con costos casi nulos, para mejorar su imagen ante el rechazo internacional, es improbable que introduzcan cambios estructurales costosos y mejoras sustantivas en materia de derechos humanos.

Cárdenas argumenta que la presión internacional en el Cono Sur produjo efectos importantes solo después de que el régimen correspondiente hubiera eliminado sus amenazas a la seguridad nacional reales o imaginadas (p. 83). En tanto esas formas de

[35] Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, 1998).

[36] *Ibid.,* p. 13.

resistencia subsistieron, los beneficios de la represión interna probablemente eran superiores a los costos de las críticas de derechos humanos (p. 83). Así fue en el caso de Chile, por ejemplo. Aunque las violaciones disminuyeron tras la supresión de la resistencia armada interna en 1976, violaciones adicionales tuvieron lugar después de la violencia interna renovada procedente de grupos de izquierda en 1979, con independencia de la presión externa (pp. 78-79). En el mismo sentido, en Argentina las violaciones declinaron precipitadamente solo cuando los grupos armados internos dejaron de tener actividad, y el gobierno no pudo ya justificar los niveles previos de represión (p. 82).

En palabras de Cárdenas, las pruebas "arrojan dudas sobre el grado en que el Estado soberano ha cambiado y es probable que cambie radicalmente como consecuencia de normas de derechos humanos [...] Los análisis cuantitativos y cualitativos sugieren que la dinámica que atrae y aleja a los Estados a la hora de responder a la presión de derechos humanos en formas en apariencia contradictorias ha sido congruente a lo largo del tiempo" (pp. 131-132).

Wright analiza los tipos de correlación citados por Cárdenas de una forma parecida. Por ejemplo, observa que a pesar de la presión extranjera, Pinochet no hubiera probablemente disuelto la Dirección de Inteligencia Nacional (DINA), la policía secreta infame de su régimen, responsable de incontables actos de secuestro, tortura y asesinato, si no hubiera ya esencialmente "cumplido su misión" (p. 79). Incluso después de disolver formalmente la DINA, Pinochet simplemente la reemplazó con una nueva institución de inteligencia que era una "replica fiel" de la antigua, con un nuevo nombre para darle la apariencia de una reestructuración genuina (p. 79). Según Wright, la lección es que la dictadura argentina aprendió de Chile que la forma de silenciar la crítica era esconder las violaciones haciendo "desaparecer" a sus enemigos, en vez de adoptar medidas menos represivas (p. 108). Wright, pasando a un ejemplo más contemporáneo, señala que Colombia, que enfrenta "una guerra de guerrillas intensificada y una violencia impulsada por las drogas" es el único país que ha aumentado su nivel de represión considerablemente desde 1990 (p. 32). La situación colombiana confirma la hipótesis de Cárdenas de que en tanto persistan las amenazas de seguridad internas, los órganos internacionales de derechos humanos tendrán relativamente poca influencia más allá de fomentar medidas cosméticas.

Si nos ocupamos de la era postransicional, el estudio de Wright demuestra, explícita e implícitamente, que los intentos por hacer responsables a los autores de graves violaciones de derechos humanos tanto en Chile como Argentina tuvieron resultados radicalmente diferentes en diferentes periodos debido a diversos factores nacionales. Wright muestra que a pesar del apoyo público a favor de asignar responsabilidad por las violaciones, unos pocos actos amenazantes por grupos izquierdistas en Chile (entre los cuales hubo un asesinato de un personaje importante) fueron capaces de reducir la repercusión de una informe condenatorio de derechos humanos, lo que ocurrió en gran parte mediante la supresión de la cuestión de los derechos humanos del discurso público (p. 191). Acontecimientos parecidos, entre los cuales estuvo el ataque a una base del ejército, recortaron el apoyo público a favor de la responsabilidad pública por las violaciones en Argentina (p. 156). A primera vista, el arresto de Pinochet en Londres en 1998 y el resurgimiento consiguiente de los esfuerzos para reclamar responsabilidad pública por las violaciones podrían parecer que apoya el lado más optimista de la tesis de Wright: el arresto del otrora jefe del Estado, inimaginable durante los peores años de abuso en Chile y Argentina, podría interpretarse correctamente como una indicación clara de un nuevo consenso global sobre derechos humanos, inaugurando "la era de los derechos humanos" proclamada por Roht-Arriaza.

Sin embargo, a pesar del arresto de Pinochet, los acontecimientos mencionados muestran que el poder de la comunidad internacional de derechos humanos para influenciar la responsabilidad por violaciones de derechos humanos en las sociedades chilena y argentina ha estado lejos de ser una progresión lineal de un comienzo modesto a un gran éxito. Además, incluso unos resultados que están lejos de ser perfectos en Chile y Argentina fueron el producto de niveles sin precedentes de presión: como lo expresa Wright, Chile y Argentina han desarrollado "los movimientos de derechos humanos más grandes, diversos, vigorosos y persistentes en Latinoamérica" (p. xiii). A la luz de esto, parece menos probable que el marco internacional de derechos humanos haya alcanzado "una etapa de cumplimiento" en el que los futuros violadores de derechos humanos en otras regiones serán disuadidos de cometer actos de violencia y represión, en especial en países que carecen de movimientos nacionales bien desarrollados de derechos humanos.

EL CUMPLIMENTO DE LOS DERECHOS HUMANOS EN EL CONTEXTO GLOBAL PRESENTE. Aunque la presión internacional y la posibilidad (remota) de enjuiciamiento son hoy parte del cálculo que los funcionarios deben hacer cuando gobiernan (o viajan al extranjero y se exponen a ser arrestados por aplicación de una ley de jurisdicción universal), las principales fuerzas que mueven a los Estados a cumplir con las normas internacionales de derechos o a desviarse de ellas son todavía nacionales en su inmensa mayoría. Estas fuerzas, que incluyen la oposición política, el crimen organizado y las amenazas terroristas reales o percibidas, tienen una inmediatez de la que carecen las amenazas distantes de enjuiciamiento posterior por crímenes de derechos humanos. Aunque el marco jurídico internacional relevante ha mejorado enormemente durante las pasadas tres décadas, cabe destacar que los procesos internacionales de derechos humanos han sido muy escasos, si se tiene en cuenta la intensidad y la frecuencia de los abusos, con lo que se debilita el efecto potencial preventivo del enjuiciamiento. En este momento, ocurren asesinatos en masa en Darfur, mientras la CPI investiga, acusa y enjuicia a un puñado de criminales de guerra. En la década de los noventa, el TPI para la antigua Yugoslavia administró justicia a ritmo de tortuga mientras que las fuerzas militares y la policía cometían masacres extensas en los Balcanes. En el mejor de los casos, la posibilidad de enfrentarse a un tribunal sigue siendo nada más que eso para la enorme mayoría de los violadores de derechos humanos en el mundo: una posibilidad y además bastante remota.

La gran mayoría de las dinámicas políticas que permitieron a las dictaduras latinoamericanas no tener en cuenta la presión internacional de derechos humanos son tan potentes como siempre. Por ejemplo, Wright señala que a pesar de "una corriente continua de informes y resoluciones negativas provenientes de organismos intergubernamentales y de ONG [...], el apoyo económico y diplomático inamovible" de los Estados Unidos durante las presidencia de Nixon y Ford ayudó a Pinochet a desafiar la presión internacional sin graves consecuencias (p. 77). Hoy el apoyo de los aliados de Estados Unidos en la "guerra contra el terror", con independencia de cuál haya sido su historial de derechos humanos, genera preocupaciones parecidas. Véase, por ejemplo, las detenciones y los despidos masivos de miembros de la judicatura, abogados y defensores de derechos humanos en Pakistán durante un "estado de emergencia" que implicó la suspensión de las garantías constitucionales. Aunque la administración Bush (que ha proporcionado a Pakistán miles de millones de dólares en ayuda militar desde 20021) expresó su desacuerdo formal con la persecución política llevada a cabo por el presidente pakistaní Musharraf, los Estados Unidos confirmaron su apoyo sustantivo continuado a Pakistán, y proclamaron públicamente que

Musharraf era un aliado "indispensable" en la guerra contra el terror y que "la asociación con Pakistán [...] [es] la única opción".[37]

Una señal del papel fundamental que tienen los factores nacionales y políticos (a diferencia de las normas internacionales) en la responsabilidad por violaciones de derechos humanos es la diferencia significativa entre cómo el asunto Pinochet afectó a Argentina y Chile y cómo afectó a otros países, como Guatemala. Como señala Roht-Arriaza, el arresto de Pinochet puede que haya revitalizado los esfuerzos por llevar a juicio a los violadores de derechos humanos en Chile y Argentina, pero no en Guatemala. Esta discrepancia sin duda no es atribuible a los diferentes grados de abuso. De hecho, según todos los relatos fiables disponibles, los niveles de abuso en Guatemala fueron igual de altos que en cualquier otro lugar de Latinoamérica, cuando no superiores. Wright califica la masacre de más de 200.000 personas en Guatemala, sobre todo de etnia maya, de genocidio (p. 31).

La diferencia de la reacción de Guatemala al arresto de Pinochet tampoco se puede asociar con que no haya adoptado una jurisdicción universal. Aunque los activistas guatemaltecos encontraron retrasos a la hora de interponer demandas en jurisdicciones extranjeras (los tribunales españoles no reconocieron su jurisdicción necesaria para juzgar las atrocidades guatemaltecas hasta el año 2005), las investigaciones externas y los juicios en Guatemala, en teoría, deberían haber provocado reacciones nacionales parecidas a las que tuvieron lugar en el Cono Sur. En lugar de eso, los guatemaltecos eligieron al general Efraín Ríos Montt, su exdictador, como miembro del Congreso. Su partido controla actualmente la Comisión de Derechos Humanos del órgano legislativo guatemalteco, a pesar de existir una orden de captura vigente contra Ríos Montt, en la que se le acusa, entre otras cosas, de genocidio.[38] La razón más probable para los diferentes efectos de las demandas judiciales extranjeras en Guatemala, cuando se compara con Argentina y Chile, reside en la naturaleza de sus condiciones políticas nacionales. El estudio de Wright podría haber llegado a conclusiones aplicables de forma más general acerca de cómo están relacionadas entre sí las prácticas de derechos humanos, la responsabilidad por las violaciones de derechos y las fuerzas internacionales si hubiera comparado Estados con experiencias más diversas que las de Argentina y Chile, vecinos en el Cono Sur.[39]

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[37] Human Rights First, *Save Pakistan's Courts and Constitution,* 21 de noviembre de 2007, disponible en http://humanrightsfirst.com/defenders/alert112107_rice.htm; *"U.S. official: Pakistan's Musharraf 'indispensable' ally",* Associated Press, 7 de noviembre de 2007, disponible en http://www.cnn.com/2007/POLITICS/11/07/us.pakistan.ap/.

[38] Ana Lucía Blas, "Reparten 45 comisiones de trabajo en Congreso," *Prensa Libre*, 18 de enero de 2008, disponible en http://www.prensalibre.com/pl/2008/enero/18/214922.html.

[39] Aunque Wright reconoce que la represión de Estado y su legado en Argentina y Chile no fueron típicas de Latinoamérica en su conjunto entre 1970 y 1990 (p. 12), afirma que "A pesar de las variaciones de país a país, los casos chileno y argentino esclarecen los elementos esenciales de la crisis de derechos humanos de Latinoamérica" (p. xiii). Sin embargo, el análisis de Argentina y Chile, por sí mismo, no permite necesariamente apreciar las condiciones en las cuales las presiones internacionales llevaran probablemente a una mayor responsabilidad ante la sociedad por abusos de derechos humanos en otros países.

El libro *State Terrorism in Latin America*, de Wright, ofrece un relato detallado, convincente y muy útil de la dictadura militar chilena y argentina; ofrece algo valioso tanto a los neófitos como a los expertos. Sin embargo, los practicantes que busquen lecciones relevantes para su trabajo en el campo de derechos humanos encontrarán probablemente demasiado optimista la valoración final de Wright del poder del sistema internacional para prevenir las violaciones o castigar a los violadores. Con lo que sabemos, un orden mundial basado en "medidas preventivas efectivas" contra las graves violaciones de derechos humanos es una visión lejana en el mejor de los casos y un espejismo en el peor.

El libro de Cárdenas, *Conflict and Compliance*, demuestra el potencial limitado de los mecanismos internacionales para dar pie a progresos en los derechos humanos. Su análisis de la repercusión de la presión internacional en los Estados donde hay abusos de derechos proporciona una guía sobria, pero exacta, para aquellos que quieran diseñar estrategias de derechos humanos basadas en la historia reciente.

Como Wright deja claro en su tratamiento de las dictaduras en el Cono Sur, las tres últimas décadas han visto cómo la comunidad internacional ha llegado a un mayor consenso sobre los derechos humanos. De hecho, el lenguaje de los derechos humanos se ha convertido en el discurso dominante sobre la moralidad en los asuntos internacionales y también en la política nacional de muchos Estados. Las posibilidades de que los violadores tengan que enfrentarse a procesos judiciales en el extranjero, aunque siguen siendo escasas, han aumentado. Sin embargo, las oportunidades para el activismo creadas por factores políticos nacionales y usadas estratégicamente por los grupos locales de derechos humanos (a veces en cooperación con las organizaciones internacionales) continúan siendo la causa primordial de cambio en los Estados individuales. El análisis de Wright sobre cómo los movimientos nacionales de derechos humanos en Argentina y Chile adquirieron fuerza política se hace todavía más relevante cuando se considera la ausencia de una presencia internacional con plenos poderes y constituye la mayor contribución de su libro.

TRADUCCIÓN DE:

CAVALLARO, J.L. AND ALBUJA, S., THE LOST AGENDA: ECONOMIC CRIMES AND TRUTH COMMISSIONS IN LATIN AMERICA AND BEYOND, IN MCEVOY, K. AND MCGREGOR, L., TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE (HART PUBLISHING, OXFORD AND PORTLAND, OR, 2008).

El texto traducido es una edición abreviada del inglés. Las supresiones de texto están indicadas bien por texto entre corchetes que resume el contenido suprimido, bien por tres puntos entre corchetes ("[…]"). Las llamadas a las notas a pie de página se mantienen con sus números originales en esta traducción editada con el fin de facilitarle al lector la revisión de las notas en el texto original inglés.

LA OPORTUNIDAD PERDIDA: LOS DELITOS ECONÓMICOS Y LAS COMISIONES DE LA VERDAD EN LATINOAMÉRICA Y OTROS LUGARES*

JAMES L. CAVALLARO Y SEBASTIÁN ALBUJA

El texto traducido es una edición abreviada del inglés. Las supresiones de texto están indicadas bien por texto entre corchetes que resume el contenido suprimido, bien por tres puntos entre corchetes ("[…]"). Las llamadas a las notas a pie de página se mantienen con sus números originales en esta traducción editada con el fin de facilitarle al lector la revisión de las notas en el texto original inglés.

INTRODUCCIÓN

Las comisiones de la verdad (CVR)[40] han venido ocupando cada vez con más frecuencia una posición central en los procesos de justicia transicional. Durante los últimos 20 años, se han creado unas dos docenas de esa clase de comisiones en Estados que han pasado por transiciones de regímenes autoritarios o comunistas a formas más democráticas de gobierno. Estas comisiones han demostrado tener una

* El texto traducido es una edición abreviada del inglés. Las supresiones de texto están indicadas bien por texto entre paréntesis que resume el contenido suprimido, bien por tres puntos entre corchetes ("[…]"). Las llamadas a las notas a pie de página se mantienen con sus números originales en esta traducción editada con el fin de facilitarle al lector la revisión de las notas en el texto original inglés.

[40] Las iniciales "CVR" provienen del concepto "Comisión de la Verdad y Reconciliación". No todas esas comisiones incluyen en sus títulos la palabra "reconciliación". No obstante, en aras de la simplicidad, usamos el concepto de "CVR" para referirnos a esta clase de comisiones.

notable capacidad de adaptación en varios aspectos. Por lo tanto, las comisiones han variado en cuanto al ámbito de los abusos abordados;[2] el número, el género y la afiliación institucional de los comisionados;[3] la inclusión o no de mecanismos para perdonar a los violadores a cambio de su confesión;[4] la mención o no de los nombres de los individuos responsables de los abusos; la concesión o no de indemnizaciones y la cantidad de esas indemnizaciones;[5] la duración y el ámbito de las facultades de investigación.

No obstante, estas comisiones de la verdad, a pesar de su heterogeneidad, han adoptado reiteradamente un conjunto de parámetros establecidos por la comprensión usual del alcance del derecho y la práctica de los derechos humanos en la época de la creación de esos primeros órganos en Latinoamérica. Estas limitaciones llevaron a concentrarse en las graves violaciones de los derechos civiles y políticos, y en especial en las desapariciones forzadas, las ejecuciones y la tortura.[6] Debido a esa dependencia del marco de derechos humanos, en nuestra opinión las CVR promovidas por los Estados no han incluido en sus mandatos cuestiones relativas a los delitos económicos[7] y la corrupción,[8] temas que las organizaciones normales de derechos humanos han asumido solo en tiempos recientes.[9] Defendemos que eso ocurre a pesar de que las bases sociales condenan con energía la corrupción y los delitos económicos, y a pesar del apoyo popular a los esfuerzos por hacer responsables de los delitos económicos y la corrupción a los líderes tanto en Latinoamérica como África.[10] Aparte de la costumbre y de la idea sospechosa de que las comisiones de la verdad deberían concentrarse en los abusos de derechos humanos (y a su vez solo en abusos específicos), no hay ninguna razón a priori convincente de por qué los delitos económicos deberían excluirse del ámbito de las comisiones de la verdad transicionales.

Ocuparse de la corrupción y de los delitos económicos durante las transiciones y, después, durante la consolidación democrática, es esencial. Nos basamos en la literatura reciente sobre ciencia política, en primer lugar, para subrayar los efectos significativos que la corrupción y los delitos económicos tienen en la transición y consolidación democráticas en Latinoamérica y otros lugares, y, en segundo lugar, para apoyar el argumento de que la inclusión de la corrupción y los delitos económicos durante las transiciones y, específicamente, entre los temas de los que se ocupan las comisiones de la verdad, es vital para la realización de los objetivos democráticos.

II. Las comisiones de la verdad y el marco de aculturación

Gracias a un conjunto amplio de estudios comparativos y longitudinales, el neoinstitucionalismo sociológico progresa: la idea de que el entorno institucional global influencia en gran medida las elecciones políticas de las naciones en todo el mundo. También conocida como la escuela de la "sociedad mundo", esta teoría plantea que

> Los modelos mundialmente extendidos definen y legitiman los programas de acción locales, configurando las estructuras y las políticas de los Estados-nación y otros sujetos nacionales y locales [...] La institucionalización de los modelos mundiales ayuda a explicar muchas características desconcertantes de las sociedades nacionales contemporáneas, como el isomorfismo estructural.[11]

El isomorfismo se puede definir a su vez como "similitud estructural entre organizaciones"[12] basada en la adopción de guiones estandarizados a pesar de la existencia de diferencias entre contextos; diferencias que deberían producir una mayor variedad.

Ryan Goodman y Derek Jinks aplican este marco al trabajo académicos sobre relaciones internacionales, y ofrecen una explicación del comportamiento estatal basada en la socialización de modelos o guiones globales. Goodman y Jinks argumentan que el comportamiento estatal en materia de derechos humanos, como en otras áreas, se ve influenciado con fuerza por el entorno, lo que lleva a que los sujetos sigan el comportamiento de otros a través de la mímica, la identificación y la maximización de estatus,[13] un proceso colectivo denominado "aculturación".

Una característica importante de este análisis es el reconocimiento de que, si bien un amplio rango de Estados pueden adoptar ciertas normas o estándares como resultado de la influencia de procesos de aculturación y asociativos, el grado de implementación de esos estándares variará ampliamente, dadas las diferencias en variables nacionales, como el nivel de desarrollo, infraestructuras y cultura local. Por consiguiente, se observa un "desacople", es decir, una divergencia entre las normas adoptadas y la práctica, lo que es un resultado esperable cuando las normas son importadas.[14]

Planteamos aquí que los esquemas de justicia transicional jerárquicos, de arriba abajo, basados en modelos internacionales, han sido adoptados por Estados en gran medida como resultado de procesos de aculturación, y no como una consecuencia de su adecuación a las necesidades específicas de un contexto. Por lo tanto, el isomorfismo y el desacople, características de otros aspectos de la gobernanza estatal, están también presentes en los modelos de justicia transicional adoptados por los Estados nación.

[...]

Los modelos de justicia transicional, y los mecanismos específicos desarrollados en torno a ellos, han sido útiles para denunciar y documentar las graves violaciones de derechos civiles y políticos, y para permitir a las sociedades considerar y aplicar una variedad de soluciones a los abusos pasados. Sin embargo, hemos sugerido que son insuficientes porque excluyen el problema de los delitos económicos y la corrupción: al aplicar el concepto de aculturación a las CVR, sugerimos que una vez que adquirió legitimidad en la sociedad mundo el modelo de las CVR como vehículo para denunciar solo un conjunto limitado de violaciones de derechos humanos, se hizo difícil en extremo modificar el guion para incluir los delitos económicos y la corrupción, y, por consiguiente, desarticular el proceso de socialización del modelo.

En la práctica, no es difícil identificar la existencia de vínculos personales e institucionales que han llevado al desarrollo de este guion dominante. Mientras que las pocas primeras comisiones de la verdad, como la comisión argentina de 1984, y la comisión boliviana fracasada de 1982, pudieron haberse desarrollado en relativo aislamiento, las CVR posteriores han sido la obra de intercambios reiterados de información y consultas con miembros de comisiones anteriores y de un cuadro de académicos e internacionales en esa área. [...]

No queremos en ningún caso sugerir que esta clase de intercambios internacionales debería no practicantes ocurrir, ni cuestionamos las contribuciones vitales que han hecho al campo de la justicia transicional y a las CVR en particular. Muy al contrario: el libre intercambio de experiencias, lecciones aprendidas, mejores y peores prácticas, y precedentes históricos y jurídicos, proporcionaron un fundamento esencial para mejorar la fuerza, la eficacia y la receptividad de las comisiones de la verdad. Sin embargo, esperamos comenzar a desentrañar de manera preliminar los procesos que han llevado a la creación de un guion para las CVR que, si bien ha sido fértil en muchas áreas, ha excluido los delitos económicos de su mandato. [...]

Adicionalmente hay buenas razones para creer que las fuerzas que llevan a la aculturación y a la adopción de normas de la "sociedad mundo" están presentes, o tal vez se intensifican, en situaciones de transición, en las cuales los Estados y sus agentes están especialmente preocupados y su atención especialmente centrada en la comunidad internacional y sus estándares de legitimidad. Esta conclusión es apoyada por la investigación reciente sobre acuerdos de paz y derechos humanos, que ha encontrado que esos acuerdos son parecidos en muchos aspectos en las distintas sociedades,[21] y también el trabajo en cuestiones como la incorporación del voto de las mujeres (que muestra los parecidos en el momento de la adopción de esa institución, a pesar de las diferencias significativas en circunstancias locales).[22]

III. ¿Por qué incluir los delitos económicos en los esquemas de justicia transicional? El contexto y algunas hipótesis operativas

[...]

Podemos identificar la Comisión Sábato como el inicio del crecimiento y el desarrollo de las comisiones de la verdad en Latinoamérica. La Comisión Sábato fue establecida en Argentina después de la caída de la dictadura militar y la elección de Raúl Alfonsín como presidente.[24] Si bien la junta militar había cometido una variedad de abusos contra los derechos civiles y políticos (y cometido delitos económicos y actos de corrupción), el abuso individual asociado más de cerca con la guerra sucia impuesta en Argentina fue la desaparición forzada.[25] Por consiguiente, no sorprende que este crimen, y solo este crimen, se convirtiera en el centro de la actividad de la

Comisión Nacional para la Investigación sobre la Desaparición de Personas, la comisión de la verdad argentina.[26]

En 1985, poco después de un acuerdo negociado que puso fin a 11 años de gobierno militar en Uruguay, el gobierno civil recién formado creó una comisión para las desapariciones. Como en Argentina,[27] el mandato del órgano investigador se limitó al crimen de la desaparición, a pesar de un reconocimiento general de que la dictadura uruguaya hizo *relativamente poco uso* de esta práctica horrenda.[28] En el mismo sentido, la CVR de Chile, creada tras la derrota de Pinochet en el referéndum de 1988 y la victoria de Patricio Aylwin en 1989 y la Concertación, se concentró en las desapariciones forzadas.[29]

En 1991, Naciones Unidas consiguió un acuerdo de paz que puso fin a la brutal guerra civil de 12 años en El Salvador. El acuerdo, negociado durante un periodo de tres años (1989-1992), incluyó la intervención de una fuerza de paz de Naciones Unidas y el establecimiento de una CVR. El mandato de esa comisión se restringió únicamente a la investigación de actos graves de violencia.[30] Poco después, el prolongado conflicto armado de Guatemala llegó también a su fin bajo los auspicios de Naciones Unidas, que estableció una misión de paz, MINUGUA, [...] [que] se concentró exclusivamente en las violaciones de derechos humanos y en los actos de violencia.[31] En una línea parecida, el Comisionado Nacional Hondureño para la Protección de los Derechos Humanos, Leo Valladares, realizó también una investigación sobre un conjunto igual de reducido de violaciones que tuvieron lugar en la década de los años ochenta.[...]

A. Percepción y realidad de la corrupción en las recientes dictaduras latinoamericanas

[...]

[...] Hay un relato dominante en Latinoamérica, que sería el de que la corrupción estuvo limitada durante las muchas dictaduras que hubo en la región, y que esa corrupción ha aumentado con la llegada de los gobiernos democráticos. En cierta medida, eso puede deberse al hecho de que durante las transiciones hubo poca investigación sobre la corrupción en los regímenes autoritarios.[33] Como se explicó, las investigaciones sobre corrupción de alto nivel y delitos económicos se excluyeron del mandato de las CVR; esta omisión puede haber contribuido en cierto grado a la desafortunada y en gran medida inexacta creencia de que las dictaduras latinoamericanas no fueron corruptas.[34]

Además, la omisión de los delitos económicos y la corrupción de las CVR es especialmente destacable debido a que la enorme desigualdad social, la mala gestión de la economía y el abuso de las elites fueron en general fuerzas motoras en los conflictos subyaces cuya resolución llevó finalmente a la creación y la implementación de los mecanismos de la justicia transicional.

Aunque la evidencia sobre estas formas de abuso del poder durante los regímenes autoritarios es escasa, lo cual no es sorprendente, puesto que estos asuntos se ocultaban cuidadosamente, algunos casos de actos graves de corrupción en los que estaban involucrados oficiales militares de alto rango, los miembros de sus familias y grupos económicos con los que tenían vínculos, fueron denunciados y conocidos por el público. Alguno de ellos incluyen peculado por apropiación, fraude y apropiación de activos públicos; otros conciernen a acuerdos empresariales fraudulentos, especialmente en el proceso de privatización de las empresas públicas.

[El artículo analiza la corrupción entre líderes militares y sus subordinados en Argentina, Chile, Paraguay y Uruguay].

B. Actitudes de las bases sociales sobre la corrupción en Latinoamérica

En toda Latinoamérica, entre las bases sociales, la opinión pública rechaza fuertemente la corrupción a gran escala y los comportamientos reprochables económicos durante los regímenes económicos. En gran medida, debido a los elevados niveles percibidos de corrupción, amplios sectores de la opinión pública en Latinoamérica tienen una tenue confianza en las instituciones democráticas. El Latinobarómetro informa, por ejemplo, que en todos los países de la región el público desconfía fuertemente de las instituciones gubernamentales: en el año 2004, en promedio solo el 24 por ciento de la población confiaba en los órganos legislativos y solo el 32 por ciento confiaban en el sistema judicial.[45] Basándose en datos del Índice de Percepción de la Corrupción Mundial, elaborado por Transparencia Internacional, y la Encuesta Mundial de Valores para el periodo 1995-1997, otros análisis establecieron un nexo importante entre las percepciones ciudadanas de la corrupción oficial y los niveles de rechazo a los líderes electos, y encontraron altos niveles de correlación negativa entre la percepción de la corrupción y el apoyo a aquellos en el poder.[46]

> Cuando los ciudadanos en Latinoamérica perciben una corrupción política rampante, esas visiones se traducen directamente en la degradación de la opinión sobre los funcionarios electos y las instituciones políticas [...] Los ciudadanos perciben la corrupción y conectan esas percepciones con sus juicios sobre los líderes electos y las instituciones políticas.[47]

[...] En total, desde comienzos de los años noventa hasta el año 2005, "nueve presidentes latinoamericanos o antiguos presidentes han tenido que enfrentar procesos judiciales o han sido destituidos por acusaciones de corrupción".[52]

Frente a esta tendencia, hay un sentimiento generalizado en Latinoamérica de que no existía rechazo a los altos niveles de corrupción durante los regímenes autoritarios. [...] Históricamente, es menos probable que los latinoamericanos condenen un régimen autoritario si consigue ciertos fines, como el orden y la predictibilidad; de hecho, han apoyado sistemáticamente los personajes autoritarios. No solo la región tiene una larga historia de caudillismo, o de hombres fuertes que

cuentan con un amplio apoyo popular, sino que esta tendencia se ha extendido bien dentro de los periodos transicionales en las pasadas dos décadas.[52]

Los patrones de voto corroboran este apoyo popular a los personajes autoritarios. Hugo Chávez en Venezuela, Lucio Gutiérrez en Ecuador y Ollanta Humala en Perú son casos pertinentes. Todos ellos violaron el orden constitucional e intentaron tomarse el poder por medios extrajurídicos.

Sin embargo unos pocos años después, Chávez y Gutiérrez ganaron elecciones presidenciales. Y Ollanta Humala, un exmiembro de los cuerpos militares que intentó también una insurrección, estuvo muy cerca de ganar las elecciones presidenciales en Perú.[*] De hecho, en Latinoamérica el comportamiento antidemocrático ha demostrado ser un medio muy eficiente para iniciar una carrera política y adquirir visibilidad.[53]

Frente a esa tendencia extendida, argumentamos que el rechazo público generalizado a la corrupción, ampliamente documentado, que se observa en los regímenes democráticos aplica también a los gobiernos autoritarios. [...]

A pesar de los elevados niveles de rechazo popular a la corrupción y a las actividades económicas ilícitas tanto en los regímenes democráticos como autoritarios, las CVR constituidas por ciudadanos, "de abajo a arriba", también han excluido de forma regular de sus investigaciones los delitos económicos y la corrupción.[55] Aunque otras causas pueden explicar también este fenómeno, sugerimos que la transferencia y la institucionalización de un guion estándar desde arriba explican la exclusión de las preocupaciones relacionadas con la corrupción. En otras palabras, debería esperarse que estas comisiones omitieran los delitos económicos y la corrupción de sus investigaciones como reflejo del modelo institucionalizado extendido que las comisiones oficiales establecieron y promovieron.

[...]

C. La deslegitimación de los regímenes dictatoriales y conseguir la consolidación

Según la visión funcionalista que dominó la literatura de la ciencia política durante varias décadas, la corrupción era considerada útil para la organización y el desempeño políticos; se consideró incluso más relevante durante las épocas autoritarias, puesto que proporcionaba "zonas de libertad y de libertad de movimientos" y ayudaba a "redistribuir los recursos públicos mediante medios paralelos accesibles a grupos que de otra forma estarían excluidos".[57] En tiempos más recientes, la visión funcionalista ha sufrido fuertes críticas. Esas críticas, apoyadas por pruebas empíricas, alegan que tanto la experiencia como la percepción de la corrupción socaban la legitimidad de un régimen.[58] El argumento de que el

[*] Este artículo se escribió en el año 2008. En el año 2011 se celebraron elecciones presidenciales en Perú y Ollanta Humala fue elegido presidente. (Nota del Traductor)

predominio de la corrupción en muchas sociedades y su estatus como conjunto paralelo de normas y comportamientos aceptados la hace saludable para los procesos sociales ya no es la visión dominante. La investigación contemporánea sobre la experiencia con la corrupción (y no solo con su percepción) muestra que aquellos que viven la corrupción pierden confianza en la legitimidad de sus regímenes, y pierden también la confianza interpersonal.[59]

[…]

Si lo anterior es cierto, y nosotros creemos que lo es, investigar y documentar los casos de delitos económicos y de corrupción en los gobiernos militares podría ayudar a deslegitimar los regímenes autoritarios incluso más que las violaciones de derechos humanos. Si, como Seligson lo expresa "[u]na de las mayores limitaciones que tienen los regímenes autoritarios para establecer su propia legitimidad es que lo más frecuente sea que funcionen como cleptocracias en las que el Estado es corrupto hasta la médula, y los ciudadanos lo saben",[63] entonces hacer más visible la corrupción durante los regímenes autoritarios mediante investigaciones en los periodos transicionales ayudaría a erosionar su legitimidad. Eso es particularmente cierto en casos en los que las dictaduras gozas de elevados niveles de legitimidad y apoyo popular.

De no ser así, "los ciudadanos pueden buscar alternativas a la democracia mediante el apoyo al regreso del gobierno de los militares, o mediante el apoyo a personajes populistas pero antidemocráticos".[64]

[…]

IV. Mirando más allá de Latinoamérica

En los últimos 15 años, una segunda ola de Estados, sobre todo fuera de Latinoamérica, han pasado por una transición de gobiernos democráticos a autoritarios. Estos Estados, de manera muy parecida a las naciones latinoamericanas analizadas antes, han implementado medidas de justicia transicional congruentes con el consenso internacional creciente, que proporciona un lugar privilegiado a las comisiones de la verdad. Como en Latinoamérica, estos Estados han seguido, con algunas excepciones importantes, el guion dominante con respecto a los delitos económicos, incluso cuando eso ha diferido significativamente de las demandas nativas. Mientras que los mandatos de las CVR han tenido significativas modificaciones y adaptaciones, […] han excluido reiteradamente los delitos económicos.

La comisión de la verdad más importante y seguida más de cerca fuera de Latinoamérica ha sido la institución establecida para ajustar cuentas con los crímenes del Estado del apartheid en Sudáfrica. Esta CVR se creó por la Ley de Promoción de la Unidad Nacional y Reconciliación de 1995, un ley habilitante extensa y detallada. Los comentaristas han reconocido de forma general el papel de la CVR sudafricana en el debate regional y global sobre las comisiones de la verdad.

En un texto reciente, John Daniel y Marisha Ramdeen analizan la repercusión de la CVR sudafricana en otras comisiones de África. Daniel y Ramdeen señalan que

> Para los académicos y las ONG preocupadas por la justicia transnacional, el proceso de la comisión de la verdad sudafricana se ha convertido en el modelo con el cual se evalúan todas las otras comisiones.[69]

Y continúan diciendo sobre África:

> La atención que atrajo el proceso de la comisión de la verdad sudafricana y su aclamación internacional generalizada han hecho que este instrumento específico se convierta, en los últimos diez años, en parte de los paquetes de acuerdos de paz en varias situaciones de conflicto africanas.

Desde el comienzo de la transición de Sudáfrica, ha habido en torno a una docena de CVR en África y Asia. Una rápida mirada a los mandatos de las siguientes CVR revela que han seguido el modelo de concentrarse en las violaciones graves de los derechos civiles y políticos: Burundi (1995-96); Chad (1990); Alemania (1992); Ghana (2001-04); Uganda (1986-94); Sri Lanka (1994-97); Zimbabue (1985); Corea del Sur (2002); Liberia (2006); Nigeria (1999); Haití (1994-96); Sierra Leone (2002-04); East Timor (2001-05); Marruecos (2004-06); Togo (2000), y Fiyi (2005). No obstante, ha habido excepciones. En Timor Oriental, por ejemplo, la comisión de la verdad consideró los derechos económicos, sociales y culturales. Sin embargo, ese informe no incluye delitos económicos ni busca identificar a los individuos y a las autoridades más importantes responsables de ellos.[70]

Chad es el único otro país en el que durante la transición una Comisión llevó a cabo la investigación de los delitos económicos. El presidente, elegido en 1990, creó una "Comisión de Investigación sobre los Delitos y los Peculados Cometidos por el expresidente Habré y sus cómplice o coadyuvante". Aunque las recomendaciones de esta comisión nunca se pusieron en práctica, investigó con éxito los delitos económicos del régimen Habré. El hecho de que esta comisión funcionara antes de un periodo en el que la aculturación y la expansión de un modelo internacional estándar estuvieran extendidas puede confirmar nuestra hipótesis preliminar, es decir, que las CVR locales podrían incluir delitos económicos si no están muy influenciadas por el guion internacional.

Dos países consideraron al inicio incluir la corrupción y los delitos económicos en el mandato de sus CVR oficiales, pero en última instancia no lo hicieron. El primero es Kenia. Después del fin del régimen Moi, el presidente democráticamente elegido, Mwai Kibaki, favoreció establecer una comisión de la verdad. Se creó una Fuerza de Trabajo para el Establecimiento de una Comisión de la Verdad, Justicia y Reconciliación, que discutió y en última instancia le proporcionó al gobierno keniata el mandato de la CVR. Aunque la inclusión de los delitos económicos se consideró seriamente por el Grupo de Trabajo, al final se dejaron a un lado.[71]

[...]

Ghana también excluyó la corrupción y los delitos económicos. Aunque la legislación original que creó la Comisión Reconciliación de Nacional incluyó una norma para la

investigación de la corrupción, se abandonó en última instancia. En lugar de eso, la investigación de esos abusos se le encargó a la Oficina para Fraudes Graves (SFO), una institución que se había usado antes para reprimir a los oponentes. Al final,

> La audiencias públicas en Ghana han incluido un porcentaje alto de audiencias sobre "delitos económicos", en parte debido a que una cantidad importante de confiscaciones de propiedad motivadas políticamente fueron acompañados de acoso y arrestos ilegítimos. Parece probable que una de las principales recomendaciones de la comisión será la restitución de la propiedad.[76]

El informe, publicado por el gobierno ghanés en abril de 2004, incluye una sección sobre la restitución de propiedad, aunque limitada en su alcance, que declara que "[a] aquellos que han sufrido la confiscación ilegítima de la propiedad, como tierra y edificios, se les debería devolver, en principio, sus propiedades".[77]

El mandato de la CVR liberiana incluye los delitos económicos. A medida que progresen los trabajos de la Comisión, se verá si esos delitos y la corrupción se documentan de hecho, y hasta qué punto.[78]

V. Conclusión

[…]

Las CVR enfrentan una variedad de limitaciones, relacionadas con las presiones políticas, y también límites de tiempo, recursos y personal profesional. Hay que reconocer que la inclusión de la corrupción y los delitos económicos puede servir para potenciar esas dificultades. No obstante, investigar las actividades ilegítimas económicas cometidas por regímenes autoritarios puede tener varias funciones, y conseguir una ganancia neta para las CVR. En primer lugar, la investigación puede proporcionar un mecanismo para ocuparse de las exigencias populares de que se determine la responsabilidad por esos actos de manera efectiva. En segundo lugar, puede ser muy funcional para deslegitimar los regímenes autoritarios, incluso más que denunciar las violaciones de derechos civiles y políticos. Por último, investigar esa clase de delitos puede ser muy útil para la consolidación de democracias pujantes.

Puede haber llegado la hora de repensar, al menos en parte, el paradigma predominante sobre las CVR. El movimiento de los derechos ha sufrido un cambio relativamente reciente hacia un mayor énfasis en los derechos económicos, sociales y culturales. La consecuencia es que redirigir las CVR de acuerdo con esta expansión del mandato puede llevar a una mayor inclusión de los delitos económicos y la corrupción como violaciones de los derechos económicos, sociales y culturales. Sin embargo, en lugar de esperar a que el ímpetu para el cambio provenga de las organizaciones de derechos humanos, aquellos que en el futuro contemplen crear CVR podrían llegar a ese mismo objetivo considerando los orígenes, la función social y los fines de estos órganos. […]

TRADUCCIÓN DE:

CAVALLARO, J.L., LOOKING BACKWARD TO ADDRESS THE FUTURE? TRANSITIONAL JUSTICE, RISING CRIME, AND NATION-BUILDING, MAINE LAW REVIEW, VOL. 60, P. 462-475, 2008.

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¿MIRAR RETROSPECTIVAMENTE PARA OCUPARSE DEL FUTURO? JUSTICIA TRANSNACIONAL, DELINCUENCIA CRECIENTE Y CONSTRUCCIÓN NACIONAL*

JAMES L. CAVALLARO

I. INTRODUCCIÓN

[…] Durante la etapa transicional de un Estado, se le ha prestado insuficiente atención a los delitos ordinarios durante esa transición y después. El proceso de construcción nacional […] requiere prestarle mucha más atención a la delincuencia común y al establecimiento de una policía transparente, eficiente y democrática, y a los sistemas de justicia penal que la controlen. Por desgracia, en lugar de hacer eso la justicia transicional, como campo, se ha concentrado de manera desproporcionada en los abusos del pasado y en los medios para reparar (o perdonar o superar) esas violaciones. Es evidente que tiene sentido concentrarse en eso. Los Estados en transición que salen de periodos en los que había graves violaciones de derechos fundamentales, conflicto interno o incluso guerra civil no pueden avanzar sin que alguna clase de ajustes de cuentas con el pasado. Hasta la fecha, este ajuste de cuentas ha variado bastante, y en los enfoques de justicia transicional ha ido de leyes de amnistía a procesos penales nacional, o de tribunales internacionales o híbridos a comisiones de la verdad y reconciliación. Para ser justos, estos procesos tradicionales se han ocupado cada vez más de la cuestión de la justicia penal y la reforma policial, una vez más con una variedad significativa de respuestas. No obstante, a mi juicio los procesos transicionales, a la hora de considerar el sistema de justicia penal, se han caracterizado por haberse concentrado en la prevención de las clases de abusos cometidos por los agentes del Estado que actuaban en los gobiernos totalitarios o autoritarios anteriores, como los secuestros secretos por motivos políticos, la tortura y las ejecuciones sumarias. De nuevo, estas cuestiones son de vital importancia y deben abordarse si se quiere que las fuerzas de seguridad de un Estado se vuelvan democráticas. Pero responder a esos abusos, si bien es necesario, no es suficiente

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para tratar los principales retos que enfrenta la justicia penal y las fuerzas de policía durante la etapa transicional y después.

En lugar de concentrarse únicamente en los abusos pasados, argumento que los Estados transicionales deben pensar y planear a futuro el crecimiento abrupto de la delincuencia común y la consiguiente indignación pública que casi de forma inevitable llegarán con el proceso de transición. Estos Estados deben considerar también la variedad de retos que la violencia criminal le plantea a la seguridad democrática, algunos de los cuales son muy duros. En otras palabras, los Estados transicionales deben concentrarse tanto o más en las clases de problemas que puede anticiparse razonablemente (desde una perspectiva sistémica y a futuro) como en aquellos que han plagado históricamente a esos países durante los periodos de gobierno no democrático.

Para apoyar esta afirmación, el artículo se basa en tres estudios de caso, dos de Latinoamérica (Brasil y El Salvador) y uno del África subsahariana (Sudáfrica).[11] Considera en primer lugar el objeto de atención parecido de los enfoques de justicia transicional con relación a la reforma de la policía y la justicia penal, recurriendo a la teoría de la aculturación para explicar la imitación de un guion dominante, retrospectivo, en los diferentes Estados transicionales. A continuación considera la incapacidad frecuente de la policía y del sistema de justicia penal para manejar adecuadamente el crecimiento de los delitos usando estos guiones replicados y las consecuencias de ese fracaso para la defensa de los derechos humanos, el Estado de derecho y la estabilidad de las nuevas democracias. El artículo evalúa las dinámicas específicas de estos procesos para cada uno de los tres estudios de caso de país. A lo largo del artículo, pretendo demostrar que eso es crucial para solucionar las deficiencias en los sistemas nacionales de justicia penal precisamente durante periodos de transición y que las soluciones para la justicia penal deberían desarrollarse en ese momento, en la medida de lo posible, de una manera objetiva y exhaustiva, en lugar de en formas que busquen responder a los problemas del Estado pretransicional. Es así que sugiero que la justicia transicional puede ir más allá de los marcos existentes, retrospectivos, para construir naciones capaces de abordar los retos que enfrentarán a medida que avancen.

II. El foco de la justicia transicional: el ajuste de cuentas con el pasado

Como ha señalado un comentarista, la justicia transicional puede definirse como la manera en que las "sociedades en 'proceso de transición', que salen de un gobierno represivo o un conflicto armado, se ocupan de las atrocidades pasadas, superan las divisiones sociales o buscan la 'reconciliación' y crean sistemas de justicia que prevengan futuras atrocidades contra los derechos humanos".[12] Otra personalidad en el campo, Priscilla Hayner, ha señalado que la "cuestión básica [de la justicia transicional] es cómo ajustan cuentas con los crímenes y abusos de Estado masivos".[13] El punto central de estas definiciones, y de muchas otras, está claramente en el proceso de ajuste de cuentas con el pasado y, en particular, con las violaciones de derechos humanos cometidas por regímenes represivos. Incluso su visión hacia el futuro está configurada por el pasado: según este modelo, el desarrollo de los sistemas de justicia, en lugar de responder a los retos futuros, debería garantizar la prevención de las atrocidades que marcaron el pasado. En el estudio de la justicia transicional se le ha prestado una considerable atención a los diferentes enfoques y dimensiones –normativa, religiosa, jurídica, práctica- que estructuran el proceso o

los procesos mediante los cuales el Estado se ocupa de los abusos pasados. Tal vez la tensión más importante en esta área concierne a las funciones relevantes que se le dan a la justicia redistributiva, más que la restaurativa. El texto fundamental de Martha Minow expresa de manera ligeramente diferente esta tensión primaria como una tensión entre venganza y perdón.[14] Sin embargo, tanto la justicia redistributiva como la restaurativa, al igual que la venganza y el perdón, tal y como se entienden en los mecanismos de justicia transicional, se concentran principalmente en la relación entre los violadores del pasado (fuerzas de seguridad), las víctimas (oponentes reales y percibidos del Estado) y la sociedad en su conjunto. Es por ello que no necesitan ocuparse directamente de la relación entre violadores futuros potenciales (los delincuentes comunes y la policía), sus víctimas potenciales (ciudadanos ordinarios o sospechosos criminales) y la sociedad en su conjunto.

III. Los esfuerzos de la justicia transicional y la reproducción de guiones

[...] El neoinstitucionalismo de la sociología, conocido también como escuela de la sociedad mundo, puede ayudar a explicar los factores intervinientes. Esta escuela de pensamiento busca explicar la proliferación de modelos de gobernanza usados en todo el mundo que se basan en un mismo conjunto de guiones globales, a pesar de la existencia de diferencias reales entre los contextos políticos; unas diferencias que deberían generar una mayor variedad de modos de gobernanza.[15] Ryan Goodman y Derek Jinks han reforzado este marco con el trabajo académico sobre relaciones internacionales, y ofrecen una explicación del comportamiento estatal basada en la socialización de modelos o guiones globales.[16] Goodman y Jinks argumentan que el comportamiento estatal en el campo de los derechos humanos está muy influenciado por el ambiente internacional circundante. En concreto, la influencia de ese entorno lleva a los gobiernos a copiar las acciones de otros Estados mediante la mímica, la identificación con los demás y la maximización del estatus, en un proceso denominado aculturación.[17] El resultado de este proceso es que los modelos institucionales adoptados por los Estados toman a menudo formas sorprendentemente parecidas con independencia del espacio y el tiempo (es decir, muestran isomorfismo), a pesar del hecho de que los contextos específicos regionales y políticos de los Estados en cuestión pueden diferir bastante y por consiguiente requerir diferentes enfoques institucionales.

En otro texto, escrito en coautoría con Sebastián Albuja, he argumentado que estos regímenes de justicia transicional, jerárquicos, de arriba hacia abajo, basados en modelos internacionales estandarizados, pueden haber sido adoptados por los Estados en gran medida como resultado de este proceso de aculturación, y no necesariamente como una consecuencia de la adecuación de estos modelos a las necesidades específicas del contexto.[18] La aculturación ayuda a explicar el enfoque parecido en muchos aspectos importantes que usan distintas comisiones de la verdad, a pesar de los diferentes contextos de los que tienen que ocuparse esas comisiones.[19] Aquí se sugiere que la aculturación puede explicar también el enfoque parecido de los enfoques de justicia transicional con respecto al sistema de justicia penal, es decir, la excesiva atención que se le presta a ajustar cuentas con el pasado y a diseñar instituciones basadas en evitar los errores del pasado. Aunque ambas cosas son vitales y comprensibles, este foco de atención podría no ser el más apropiado para Estados transicionales que casi con seguridad se enfrentaran a olas de delincuencia, acompañadas de amenazas a la seguridad humana y la estabilidad política.

Al tener como centro de atención denunciar y documentar graves violaciones de derechos civiles y políticas, los enfoques de justicia transicional han facultado a las sociedades para que consideren y apliquen una variedad de soluciones que respondan, aunque sea inadecuadamente, a los abusos del pasado. Sin embargo, basándome en los estudios de caso que siguen, sugiero que estos modelos no han tenido éxito a la hora de abordar hacia futuro los problemas de crecimiento de la delincuencia y, por consiguiente, han fracasado en responder adecuadamente a la amenaza que plantea la violencia criminal a las nuevas democracias. Sin embargo, en la medida en que las elecciones tomadas durante el periodo transicional son el resultado de la aculturación, hay esperanza de que una reevaluación crítica basada en la experiencia de los Estados que han pasado por transiciones puede llevar a la implementación de modelos con mayor capacidad de adaptación. En concreto, los Estados en proceso de desarrollar y reestructurar los sistemas de justicia penal y las fuerzas de policía pueden aprender de la experiencia de otros Estados que se han concentrado en reformas basadas en esfuerzos retrospectivos dirigidos a abusos de los derechos cuya motivación era política.

IV. DELINCUENCIA Y TRANSICIÓN

En el último cuarto del siglo XX y al comienzo del siglo XX, la violencia penal ha crecido en todo el mundo.[20] En investigaciones realizadas en Argentina, Brasil, Perú, Nigeria, Sudáfrica, Ucrania y Rusia, un equipo de investigadores del Consejo Internacional de Política de Derechos Humanos encontró que había un consenso entre los funcionarios del gobierno, los practicantes en el sistema de justicia penal y los miembros de la sociedad civil entrevistados, confirmado por las estadísticas oficiales disponibles, sobre la existencia de aumentos bruscos de los delitos violentos durante el periodo de transición.[21] Esta investigación halló todavía un mayor consenso en torno al sentimiento general de que la percepción de inseguridad entre el público había crecido significativamente durante el periodo de transición.[22] El equipo de investigación consideró también las respuestas oficiales frente al crecimiento de la delincuencia en estas sociedades transicionales.[23] Un artículo que escribí en coautoría con Mohammad-Mahmoud Ould Mohamedou basado en ese estudio observaba que:

> Las fuerzas políticas en los Estados autoritarios tienden a suprimir no solo el disenso, sino también la delincuencia, o como mínimo, la percepción general es que son efectivas para controlar delincuencia. En la medida en que esa no sea una "percepción errónea", ese "control" se consigue con un alto costo para los derechos individuales y el Estado de derecho. Antes de la transición, el control de la delincuencia en todos los Estados considerados aquí se concentró en métodos represivos y con frecuencia brutales, como la tortura sistemática y la ejecución sumaria de sospechosos, entre otros.[24]

Además, el escrito señalaba que un aspecto especialmente difícil del control de la delincuencia asociada con los periodos de transición es la desmovilización o la reforma de las fuerzas de seguridad represivas usadas por los regímenes autoritarios y totalitarios, tanto para el control del disenso político como para luchar contra la delincuencia:

> Uno de los primeros actos de los nuevos gobiernos es con frecuencia desmantelar la antigua estructura de seguridad, lo que muchas veces lleva a un vacío de seguridad. Ese vacío provoca exigencias generalizadas de un

> mantenimiento del orden más efectivo, en especial por personas que han sufrido delitos y ahora son víctimas, y que atribuyen esa circunstancia a ese vacío [...] Esa rabia colectiva configura la naturaleza de la exigencia de un mantenimiento más efectivo del orden, muchas veces mediante un mayor número de demandas a favor de la justicia retributiva [...] [E]stas demandas dan lugar a la utilización de respuestas represivas, es decir, a medidas diseñadas para atacar la delincuencia mediante redadas policiales, allanamientos y tácticas similares [...]

En el contexto del vacío de seguridad, a los encargados de determinar las políticas estatales en sociedades transicionales se les asigna la difícil tarea de garantizar la seguridad ciudadana, al mismo tiempo que impiden a la policía y a otras fuerzas de seguridad volver a las prácticas abusivas características de las sociedades pretransicionales. Ese reto rara vez se encara. En muchas circunstancias, las autoridades vuelven la mirada frente a la continuación de las prácticas abusivas. En otros casos, pueden alentar a la policía para que continúe combatiendo la delincuencia, aunque saben que eso en la práctica implicará graves abusos de derechos.[25]

A pesar de esta tendencia a apoyar respuestas represivas, las autoridades transicionales rara vez tienen éxito en controlar los delitos violentos. En lugar de eso, la experiencia demuestra que la policía transicional es poco efectiva para acabar con la delincuencia. Como demuestran los estudios de caso a continuación, es predecible que junto con la transición vendrá un crecimiento abrupto de la delincuencia. Las consecuencias son casi inmediatas para las autoridades democráticas: la indignación pública no solo las presiona para que tomen medidas drásticas, sino que también socaba su capacidad de gobierno y, en casos extremos, amenaza la estabilidad del gobierno transicional.

V. TRES ESTUDIOS DE CASO

[El artículo examina tres transiciones relativamente recientes en Brasil, El Salvador y Sudáfrica. Considera los contextos específicos de cada caso y defiende que en los tres casos estudiados los mecanismos transicionales no consideraron adecuadamente la delincuencia común y la capacidad del Estado para responder a esa clase de delincuencia durante la transición y después de ella. En lugar de eso, el artículo afirma que en los tres países, la atención principal que se le presta a la seguridad durante las transiciones es "retrospectiva", es decir, se concentra en los abusos de derechos, motivados políticamente de los periodos autoritarios, en lugar de mirar "hacia el futuro". El artículo defiende que esa atención fue producto, en parte, de recurrir a "guiones". En los tres casos las consecuencias han sido tremendas. Las tasas de delincuencia han crecido enormemente mientras que las autoridades estatales no han conseguido responder al reto sufrido por la seguridad ciudadana. En los tres, la delincuencia y la incapacidad del Estado para controlarla han causado graves problemas a la gobernanza democrática y han socavado la transición].

VI. CONCLUSIÓN

Este artículo ha pretendido establecer que la justicia transicional, al menos en los tres casos examinados y casi con seguridad en general, le ha dado prioridad a las medidas de reformas basadas en esfuerzos retrospectivos para ocuparse de los

crímenes del pasado y, mediante ese esfuerzo, prevenir su comisión en el futuro. Al hacer eso, estos mecanismos han fracasado a la hora de preparar a las sociedades íntegramente para afrontar una de las principales amenazas asociadas con los Estados transicionales: la delincuencia común.

La reestructuración de la justicia penal y los sistemas de policía es un proceso difícil, plagado de barreras políticas y constreñido por los recursos limitados. Incluso si los reformadores tomaran un enfoque holístico con respecto al cambio durante el periodo transicional, los retos que tendrían que encarar para reformar la justicia penal y la policía serían intimidantes. Hay pocas respuestas claras entre los académicos y los practicantes en el campo de la justicia penal a las preguntas que animan cualquier intento de reestructurar las fuerzas de policía durante una transición. No obstante, hay razones para creer que podrían combatir mejor la delincuencia común si su punto de partida fueran las necesidades y los retos futuros que tendrán que enfrentar la policía y los sistemas de justicia penal, en lugar de la necesidad de evitar la repetición del pasado.

Harvard Law School
Public Law & Legal Theory Working Paper Series
Paper No. 09-31

Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court

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REEVALUATING REGIONAL HUMAN RIGHTS LITIGATION IN THE TWENTY-FIRST CENTURY: THE CASE OF THE INTER-AMERICAN COURT

*By James L. Cavallaro & Stephanie Erin Brewer**

Over the past few decades, regional human rights tribunals have grown in both number and activity. The European Court of Human Rights (European Court or ECHR) now receives tens of thousands of petitions and issues over fifteen hundred judgments on the merits each year.[1] The Inter-American Court of Human Rights recently tripled the number of cases that it resolves annually. At the time of this writing, in mid-2008, Africa's own regional human rights court, the African Court on Human and Peoples' Rights, prepares to begin hearing its first contentious cases.[2] Currently, sixty-eight states are subject to the decisions of the two established regional courts (forty-seven in Europe[3] and twenty-one in the Americas[4]), up from less than half that number twenty years ago.[5] In the nascent African system, twenty-four African Union

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[1] EUROPEAN COURT OF HUMAN RIGHTS [ECHR], ANNUAL REPORT 2007, at 134, 137 [hereinafter ECHR ANNUAL REPORT]. This and the other documents of the Court cited below are available at its Web site, <http://www.echr.coe.int>.

[2] *See Rights Court 'Yet to Start Work,'* BBC NEWS, Sept. 24, 2008, *at* <http://news.bbc.co.uk/2/hi/africa/7633383.stm>. Additionally, supranational bodies charged with establishing individual criminal liability have flourished over the past fifteen years. Beginning with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda in 1994, these bodies now include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court.

[3] ECHR, Composition of the Court, *at* the Court's Web site, *supra* note 1.

[4] INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2007, at 5 [hereinafter 2007 IACHR ANNUAL REPORT]. This report and the decisions and other documents of the Court are available at its Web site, <http://www.corteidh.or.cr>. The Uniform Resource Locator will be cited in full for documents that are available only in Spanish.

[5] *See* ECHR ANNUAL REPORT, *supra* note 1, at 11 (reporting that the European system exercised jurisdiction over twenty-two states in 1990; this number refers to the combined jurisdiction of the European Commission, now dissolved, and the Court); Inter-Am. Comm'n H.R., American Convention on Human Rights "Pact of San José, Costa Rica," *at* <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.

member states have ratified the Protocol establishing the African Court, with an additional twenty-five signatory states.[6]

Observing from the international level, scholars and practitioners interested in promoting human rights may at first instinctively assume that this growth of tribunals on the global stage necessarily signals an equivalent increase in the power of international human rights law to protect individuals throughout the world. Yet a disproportionate focus on these institutions' existence in isolation may lead us to overlook the actual degree of success that such tribunals have had in the countries subject to their jurisdiction. While ideally the growth of human rights bodies with binding legal authority (and the expansion of these bodies' jurisprudence) should indeed translate into proportionately better human rights practices on the ground, evaluating the domestic impact of recent supranational[7] decisions often reveals a vast gap between what regional courts order and what actually happens in a country. The mounting evidence that greater institutionalization of human rights protection at the supranational level does not necessarily increase respect for human rights on the ground points to the need for a new model of how and when supranational litigation can positively affect domestic human rights practices.

To date, the most comprehensive model for how and when supranational tribunals succeed in influencing human rights situations is that pioneered in 1997 by Laurence Helfer and Anne-Marie Slaughter, based largely on a study of the success of the European Court of Human Rights. Writing at a time when the ECHR enjoyed high rates of implementation of its decisions, Helfer and Slaughter identified a series of factors that they believed contributed to the ECHR's success and that could potentially be imported into other international systems.[8] However, Helfer and Slaughter's model acknowledged that the climate of entrenched rule of law and the frequently minor nature of violations seen in Western Europe had been key factors in the effectiveness of supranational litigation in the region.[9]

Now, the world's regional human rights tribunals (including the ECHR with respect to many newly admitted member states) face the challenge of advancing human rights in states that may resist supranational decisions and that suffer from large-scale, endemic human rights violations. In this environment, many of the factors that made the early European Court successful may lose much of their relevance and explanatory power. The future effectiveness of regional courts may depend instead on their ability to operate in ways relevant to a model of human rights advancement drawn precisely from states characterized by systematic violations and resistance to supranational authority. This article represents an initial effort to set forth

[6] *See Rights Court 'Yet to Start Work,' supra* note 2; African Union, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Oct. 15, 2007), *at* <http://www.africa-union.org>. The African Court on Human and Peoples' Rights will eventually merge with the Court of Justice of the African Union to create the African Court of Justice and Human Rights, which will assume jurisdiction over any human rights cases under consideration by the Court on Human and Peoples' Rights. *See* African Union, Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.

[7] Note that our use of the term "supranational" throughout this piece does not imply that regional human rights courts have a direct, hierarchical relationship to domestic institutions or even that their judgments are automatically enforceable in domestic courts. Rather, we refer to regional courts as supranational simply in the sense that they exercise jurisdiction over a variety of countries and represent a judicial recourse for victims who have exhausted remedies available at the domestic level.

[8] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997). Factors identified include, e.g., functional capacity, fact-finding capacity, quality of legal reasoning, and independence from political interests. *See id.* at 300–36.

[9] *Id.* at 329–30, 333–34.

some of the general contours of such a model, including what we believe to be several specific features of the role of supranational courts in this context.

We begin with the assertion that in states where respect for human rights is not entrenched, supranational tribunals are unlikely to enjoy the automatic implementation of their decisions, particularly when these decisions call for a significant political or financial commitment or implicate endemic human rights problems. As a result, supranational courts will often lack the power to trigger lasting improvements in the protection of human rights simply by directing governments to change their practices. Rather, the primary actors who provoke such improvements are generally the social movements, human rights activists, members of the media, members of government with progressive views on human rights, and others carrying on long-term advocacy campaigns or pushing for better policies on a given issue. We therefore maintain that supranational tribunals are most likely to be effective when their procedures and jurisprudence are relevant to such actors' long-term efforts to advance human rights.

A corollary of our argument is that supranational courts should view individual cases that are emblematic of persistent or structural human rights problems as opportunities to stimulate broader change on the relevant issues. Thus, we contend that courts should follow procedures that increase the relevance of court cases to domestic (and in some cases, international) movements working to eliminate the structural causes of the violations in question. Without this broad strategic focus, supranational litigation (which affords access to only a tiny fraction of victims) will function as a lottery in which the handful of petitioners whose cases reach a court will obtain benefits not available to the vast majority of similarly situated victims.

Finally, we emphasize that adjudicating human rights cases in ways likely to stimulate lasting change beyond a given case requires a court, while remaining impartial in its factual evaluations and legal determinations, nonetheless to stay in touch with factors such as the prevailing social and political climate in countries subject to its jurisdiction; the strategies of relevant national, regional, and international human rights campaigns; existing or planned government projects aimed at addressing human rights problems; and the shape of domestic public opinion on human rights issues. In this regard, it is axiomatic that courts, whether domestic or international, must understand the reality within which they work to be relevant and effective. Domestic tribunals, by their nature and location, are more likely to possess this type of awareness. Supranational courts, located far from some of the countries over which they exercise jurisdiction and immersed in an ever-growing network of global legal norms, are in greater danger of losing touch with the day-to-day realities on the ground. This potential remoteness, combined with the possibility of challenges to their authority, underscores the need for such tribunals to monitor the concrete factors working both for and against human rights in respondent states and to evaluate whether and how they can respond to these factors while maintaining their fundamental identity as impartial judicial bodies.

Although we briefly assess recent developments in the European human rights system, we use the Inter-American Court as the principal lens to elaborate on our arguments. Drawing on case studies from the Court's jurisprudence, we argue that this body has been most effective in contributing to respect for human rights when its judgments could be incorporated into domestic actors' broader strategies to promote positive change on the underlying issues. In recent years, however, the Court has undergone procedural reforms that have caused a case-by-case reduction in the days of public hearings held and the number of witnesses heard by the Court. These developments, we suggest, may sometimes reduce the effect of the Court's work

for domestic actors. We also consider possible advocacy and enforcement challenges presented by states' increasingly frequent strategy of acknowledging responsibility for alleged violations before the Court, sometimes leading to a reduction in independent fact-finding and live Court proceedings against them. Finally, we examine both positive and negative aspects of the recent jurisprudence of the Court, underscoring the need for it to render judgments that are relevant and responsive to the domestic reality in a given country. By critically evaluating these aspects of the Inter-American Court, we demonstrate how our theory of supranational litigation against states in which respect for human rights is not entrenched applies in practice, and we explore ways that supranational courts might adapt their working methods to maximize positive impact. We hope that our conclusions about the inter-American system serve as a starting point for related thinking about other systems and contribute to the consolidation of a more generally applicable framework for understanding how regional tribunals can advance human rights.

I. The Role of Supranational Tribunals in Advancing Human Rights

Moving Beyond the Western European Model of Compliance

Until 1988 (the year that the Inter-American Court issued its first merits judgment), the only regional human rights tribunal resolving contentious cases was the European Court of Human Rights. Created in 1959,[10] the ECHR hears interstate and individual cases against states parties to the European Convention on Human Rights. Recognition of the ECHR's contentious jurisdiction is now compulsory for all parties to the Convention.[11]

For nearly three decades, the European Court thus provided the only model for observing whether and how a regional human rights court could influence state practices. The model was widely hailed as a triumph by scholars and practitioners alike. Helfer and Slaughter, writing in 1997, called the ECHR a "remarkable and surprising success"[12] and noted that the degree of compliance with its judgments in individual cases had been "extremely high."[13] Indeed, examples abound of cases in which the ECHR's decisions resulted in concrete changes in policy and practice. Legal scholar Dinah Shelton observes:

> In Europe, it is relatively easy to demonstrate the effect of the ECHR . . . . Austria, for example, has modified its Code of Criminal Procedure; Belgium has amended its Penal Code, its laws on vagrancy, and its Civil Code; Germany has modified its Code of Criminal Procedure regarding pre-trial detention, given legal recognition to transsexuals, and taken action to expedite criminal and civil proceedings; the Netherlands has modified its Code of Military Justice and the law on detention of mental patients; . . . Sweden introduced rules on expropriation and legislation on building permits; Switzerland amended its Military Penal Code and completely reviewed its judicial organization and criminal procedure applicable to the army; and France has strengthened the protection for privacy of telephone communications.[14]

[10] ECHR Annual Report, *supra* note 1, at 11.

[11] *Id.*

[12] Helfer & Slaughter, *supra* note 8, at 276.

[13] *Id.* at 296.

[14] Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 Duke J. Comp. & Int'l L. 95, 147 (2003) (footnotes omitted). Some observers caution that compliance in Europe may be more nuanced than

Given the generally high degree of respect for the rule of law by the governments in question, there is little doubt that the legal reforms and policy efforts cited above often, if not always, translated into better protection of human rights for the intended population. Shelton states that the ECHR has clearly influenced, inter alia, "practice in criminal law, the administration of justice and family, immigration, media and property law."[15]

Broadly speaking, then, if one takes the European experience through the early 1990s as a model for how supranational tribunals should carry out their work, it follows that a tribunal should issue jurisprudence instructing governments to alter their policies to correct human rights problems, knowing that in a large percentage of cases, such instructions will shape actual domestic policy formation and practice. Under this model, advances in procedure or jurisprudence that strengthen a human rights system at the regional level—such as by allowing it to process more cases—would translate into corresponding enhanced human rights protection at the domestic level.

Over the past fifteen years, however, supranational tribunals have sought to influence human rights situations far different from those seen in Western Europe in the first decades of the ECHR. Even the political landscape of the Council of Europe has changed considerably during this time with the entry of a significant number of new members (largely former Soviet bloc states). As we contend in the paragraphs that follow, given the complex and often severe human rights problems that regional tribunals must address today, the model of governmental compliance exemplified by the early ECHR cases is no longer the primary reference point for how regional courts influence state practice. In fact, it may now be the exception rather than the rule.

The reason for this discrepancy becomes clear when one considers the specific set of factors that characterized the European system through the early 1990s. Most salient, at this time the European Court exercised jurisdiction over a relatively homogeneous group of Western European states in which democratic governance and the rule of law were already well established. Many states in the Council of Europe prior to the collapse of the Berlin Wall shared a specific commitment to implement the decisions of the European Court in their domestic systems, a commitment that existed not only in law, but also in practice.

While hierarchical implementation of human rights jurisprudence generally (if not always) worked in the European system, we argue that this had less to do with the inherent nature of supranational tribunals than with the particular domestic conditions in the states involved. Indeed, in their study of the European system in 1997, Helfer and Slaughter acknowledged that for a human rights body to enjoy the levels of state compliance seen in Europe, ideally certain political and structural conditions must be met. They noted that

existing scholarship demonstrates. Professor Mark W. Janis, for example, calls for more comprehensive studies of the past and present effectiveness of the European system. Janis notes that while the system's compliance record may well be comparable to that of many domestic courts, without truly comprehensive data, "one must be careful not to go too far in asserting a nearly perfect record for compliance with Strasbourg judgments and decisions." Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT'L L. 39, 41–42 (2000). We note, for example, the large number of judicial process violation cases lacking compliance by Italy as a clear counterexample. *See* Council of Europe, Simplified Global Database with All Pending Cases for Execution Control (July 2007), *at* <http://www.coe.int/t/e/human_rights/execution/02_documents/PPIndex.asp> [hereinafter Global Database]. Whether or not the European system ever enjoyed near-perfect compliance, what is important here is the general trend toward domestic implementation that was historically demonstrated in a large number of European cases.

[15] Shelton, *supra* note 14, at 147.

> the existence (in states subject to the jurisdiction of a supranational tribunal) of domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their interests independently from other government institutions, is a strongly favorable precondition for effective supranational adjudication. It may even be a necessary (although not sufficient) condition for maximally effective supranational adjudication.[16]

They likewise highlighted the "minor and unintentional nature of most violations" at issue in the European system, adding that the nonviolent, administrative character of the majority of petitions to the ECHR as of 1997 meant that resolving the underlying problems did not require large-scale policy overhauls by the offending states.[17]

By contrast, the entry of roughly twenty new members into the Council of Europe beginning in the early 1990s—many of which are former Soviet bloc states typified by grave violations and more limited experience of the rule of law than Western Europe—has presented the ECHR with a significantly different political climate. Today, the notion of hierarchical implementation of jurisprudence is less and less relevant even in Europe, as the ECHR faces both challenges to its authority[18] and an increased number of cases involving systematic, violent human rights violations.[19] Its 2007 annual report notes that five member states—Russia, Turkey, Romania, Ukraine, and Poland—accounted for 59 percent of the Court's docket as of the end of that year.[20] In the prior year's report, virtually all of the example cases involving deprivations of life, excessive use of force by state authorities, torture, and unlawful arrest arose from facts in new member states (notably Russia), and in Turkey.[21] Further, the statistics of the Council of Europe's Committee of Ministers reveal that the majority of ECHR judgments awaiting compliance supervision by the committee (excluding the large family of similar cases involving delays in civil and criminal proceedings in Italy) now involve Eastern European member states and Turkey.[22] These are precisely the sort of states whose political and human

[16] Helfer & Slaughter, *supra* note 8, at 333–34.

[17] *Id.* at 329 (citing Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?* 12 NETH. Q. HUM. RTS. 153, 153–54 (1994)). Christina M. Cerna, a specialist in the Inter-American Commission Secretariat, also underscores this distinctive feature of the early ECHR, stating: "Until 1989, the European human rights system functioned as a kind of regional Supreme Court, concerned with what I would call lifestyle issues, whereas the Inter-American system dealt with traditional human rights violations involving the right to life and physical integrity." Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 95 ASIL PROC. 75, 76 (2001). Note that while we highlight this contrast in relation to the ability of human rights courts to stimulate change on the relevant issues, we do not mean to minimize the serious impact that nonviolent or "administrative" violations can have on victims' lives (examples that come to mind include cases of discrimination or delays and irregularities in judicial proceedings).

[18] Shelton, *supra* note 14, at 143 (noting challenges to the authority of the Court's judgments in cases of serious or widespread violations).

[19] Significantly, in those cases the ECHR's power has historically been weakest. *Id.* at 142 ("The ECHR has been fortunate in having few cases of gross and systematic violations. Those cases that have been brought indicate the limitations of the judicial process in resolving systemic failure of the rule of law.").

[20] ECHR ANNUAL REPORT, *supra* note 1, at 136.

[21] ECHR, ANNUAL REPORT 2006, at 59–61, 63.

[22] Global Database, *supra* note 14. Note that multiple factors (such as the number of cases brought against a state, when they were decided, and how many issues are involved) influence the distribution of cases under supervision. We do not view these data as an exact measure of state willingness to implement ECHR decisions. However, they serve as a broad indicator of the scale on which enforcing compliance in newer member states is a challenge that the European system must address.

rights contexts over the past half-century have differed substantially from those of the traditionally democratic countries on which much of Helfer and Slaughter's analysis of ECHR effectiveness was based.[23] In fact, the large-scale or violent human rights violations seen in some of these countries often bear greater similarity to those that have plagued the inter-American human rights system for two decades.[24] Christina M. Cerna of the Inter-American Commission's secretariat noted in 2003 that "the conflicts occurring in these [some of the newly democratic] states, such as the conflict in Russia with Chechen rebels, . . . might justify characterizing this development as the Latin-Americanization of the European system."[25]

As this analogy suggests, the experience of the inter-American system has been far different from that of the early ECHR. When the Inter-American Court came into being in 1979, it entered a region characterized largely by authoritarian regimes, mass atrocities, and violent human rights violations, such as massacres in indigenous communities and prisons, as well as widespread forced disappearances of political dissidents. By the time the Court received its first contentious cases in 1986, the landscape in the Americas was changing, but still included several conflict-ridden states and recent transitional democracies. Today, the Court continues to adjudicate cases of severe, endemic violations such as paramilitary violence, summary executions, use of torture by police, and brutal violations against detained individuals.

Resolving these problems requires greater and more sustained efforts than were entailed by many of the policy changes triggered by the early ECHR. However, available evidence demonstrates that the Inter-American Court wields *less* rather than *more* political power to cause governments to undertake human rights reforms.[26] As we discuss below, throughout its lifetime the Inter-American Court has had to contend with explicit challenges to its authority, widespread noncompliance with certain elements of its decisions, and a shortage of political support from its parent organization, the Organization of American States.

The experience of the Inter-American Court and the challenges now facing the European system confirm our belief that the early European Court is not a representative model of how regional courts influence states' human rights practices outside the entrenched democracies of

[23] In an article published this year, Helfer discusses the more complex political landscape currently facing the ECHR and the European system's overwhelming docket crisis. In response to these challenges, Helfer argues that the European system should enact reforms to enhance its *embeddedness* in national legal systems, defined roughly as the extent to which the ECHR "can penetrate the surface of the state to interact" directly with government institutions. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 131 (2008). The ultimate goal of embeddedness is to bolster domestic institutions until they can assume the task of resolving violations without the need for intervention by the Court. *Id.* at 156. Under this same model, however, the ECHR is justified in increasing its level of scrutiny and intervention in states whose domestic systems are currently inadequate to remedy human rights violations. *See id.* at 138–46.

[24] Not to oversimplify, we recognize that the early European Court did address some cases that focused on situations of violence, even in established Western European democracies (to name just one well-known example, *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 25 (1978), considered brutal interrogation techniques employed by British forces in Northern Ireland). The data in the paragraphs above are meant to demonstrate a very broad trend; there are, of course, exceptions to each of the tendencies referenced here.

[25] Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 202 (2004).

[26] *See, e.g.,* Thomas Buergenthal, *New Upload—Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT'L L. & POL. 259, 276–77 (2005) ("[D]espite the fact that this year the Court celebrates its twenty-fifth anniversary, it still has a long way to go to gain the acceptance and prestige in the Americas that the European Court enjoys in its region—or at least in the Western European parts thereof.").

Western Europe. This understanding is even more relevant when one considers that the African Court, too, will soon face significant challenges as it begins to operate in a climate of severe violations and lack of deep-rooted respect for the rule of law. In this regard, we note that the African Commission on Human and Peoples' Rights has operated in the context of limited compliance with its determinations.[27] The question presented, as we see it, is, how can tribunals positively influence human rights practices when dealing with states that may not automatically implement supranational judgments?

Primarily on the basis of a survey of case studies in the inter-American system,[28] we contend below that supranational tribunals will generally have the greatest impact when their procedures and judgments are relevant to the actors working to advance specific human rights in these countries, including not only state agents but also human rights organizations, social movements, and the media. This argument finds support in Helfer and Slaughter's analysis of factors that contribute to the effectiveness of a human rights tribunal, one of which is awareness of audience. Helfer and Slaughter note that even at its height, the ECHR recognized the value of addressing its jurisprudence to a broader audience than just governments, reflecting the following understanding:

> Individuals and their lawyers, voluntary associations, and nongovernmental organizations are ultimately the users and consumers of judicial rulings to redress a particular wrong or advance a particular cause or set of interests. . . . [A]ppreciation of the relationship between these social actors and the institutions of state government opens the door to deploying them as forces for expanding the power and influence of supranational tribunals.[29]

We suggest, however, that rather than viewing local actors as forces to be deployed to increase the power of a tribunal, human rights tribunals should understand that international rights courts are most effective when their work contributes to efforts deployed *by* domestic activists as part of their broader human rights campaigns. Professor Obiora Chinedu Okafor, in an analysis of the effects of recommendations of the African Commission, comes closer to endorsing this view:

> [A]n examination of the operations or mechanics by which [the African system's] influence was exerted reveals that the system was only able to work in the way it did largely because it allowed itself to be mobilised and deployed in creative ways by various activist groups

[27] Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AJIL 1, 5 (2007) (reporting that as of mid-2003, only 14 percent of African Commission cases had resulted in full compliance).

[28] We recognize that significant variation exists among states subject to the jurisdiction of the Inter-American Court, and that some states have stronger legal mechanisms for implementing its decisions than others.

[29] Helfer & Slaughter, *supra* note 8, at 312. Political scientists studying the European Union have argued that supranational litigation can serve as a catalyst for social mobilization by, inter alia, defining rights in ways that spur or strengthen the development of social movements around these rights and paving the way for future strategic litigation in domestic courts. Once mobilized, social actors can then exert influence on the broader policy issues at stake and potentially expand space for citizen participation in government processes in the long term. *See generally* RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE (2007) (analyzing the interactions between litigation and mobilization in the context of the European Court of Justice, with particular attention to gender equality rights and environmental protection). While the institutional setting of the European Union is distinct from that of the inter-American system, the basic principle that supranational cases can serve as focal points for domestic mobilization is relevant to our arguments regarding the role of the Inter-American Court.

> that operated *within* Nigeria. . . . The system's influence enabled them . . . . to persuade many in the discerning public to put pressure on the military regime to act in the ways in which these activists desired, to justify preferred interpretations of existing constitutional provisions, and to embarrass (and de-legitimise) the military on many occasions, thereby helping to transform public ideologies regarding the appropriateness of military rule and many of its characteristic practices.[30]

In an analysis of compliance with recommendations of the African Commission from 1994–2003, Frans Viljoen and Lirette Louw likewise report that compliance is enhanced when a petition to the African Commission forms one part of a broader social movement. They consider several cases illustrating the role of international pressure and domestic mobilization in persuading states to comply with Commission recommendations.[31]

While there is thus some recognition that supranational tribunals maximize their effectiveness by responding to the local political and social contexts in which they work (including the ongoing advocacy efforts of domestic groups), existing scholarship provides little guidance on precisely how this perception should inform the practice of the tribunals. To date, the bulk of the scholarship has focused on the legal aspects of supranational jurisprudence rather than on how these courts can maximize their on-the-ground impact. It is to address this imbalance that we seek to develop a model of how courts can increase the likelihood of advancing respect for human rights in contexts of active or passive resistance to implementation of their judgments.

What Role for International Courts?

As an initial matter, one might of course question the core thesis that regional human rights courts should develop procedures and judgments that are responsive to the social and political contexts in which they operate. These bodies, critics may assert, are or should be tasked with deciding individual cases, insulated from the local, national, and regional political battles that might be affected by their judgments (precisely the sort of political concerns that shape the decisions of other intergovernmental organs, such as general assemblies, councils of ministers, and multinational parliaments).

At an intuitive level, this argument is appealing. We certainly agree that courts must decide individual cases fairly. For example, for an international court to assess which political actors would benefit from, and which would be prejudiced by, each possible substantive outcome in a given case and then to decide in accordance with the interests of one political group over another would undermine the integrity, and delegitimate the rulings, of the court. However, the questions presented are both broader and more subtle than this extreme example suggests.

As a basic starting point in this discussion, one must consider whether it is appropriate, when defining the goals and operating procedures of a court, to extend the scope of one's review beyond the moment that the judges issue their legal resolution of an individual case: that is,

[30] Obiora Chinedu Okafor, *The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding* within *African States*, 8 INT'L J. HUM. RTS. 413, 431 (2004) (footnotes omitted).

[31] Viljoen & Louw, *supra* note 27, at 28–31. Viljoen and Louw's data also suggest that democratic openness in a country predicts better compliance, *id.* at 26, as do follow-up enforcement efforts, *id.* at 32. These results fit with a model in which domestic activism, international pressure, and supranational enforcement efforts combine with a particular domestic climate to prompt positive change.

whether it is appropriate to consider not only the internal workings of the court, but also its real-world impact and interactions with the societies over which it exercises jurisdiction.

In this regard, we presume that impact matters, and should matter, to regional rights bodies. While this view may sound like a significant departure from the traditional view of a court's role, we argue that this role is entirely consistent with the goals that animate international human rights law and international oversight mechanisms. International rights courts should serve to promote respect for human rights in the regions where they operate; that is, while a court should never align itself a priori with a certain political party, government, nongovernmental organization (NGO), or other actor, once an objective evaluation of the evidence has proven the existence of human rights violations, the court should issue judgments and reparations orders with the highest possible likelihood of contributing to the actual elimination of the abuses in question.[32]

This point brings us back to our core thesis: namely, that it is both appropriate and necessary for courts to be aware of their factual and political surroundings to maximize their relevance and effectiveness in their regions. Once again, this does not mean that a court should yield to political pressures in individual cases. Rather, what we attempt to analyze in this article is what sort of procedures and jurisprudence *in general*—in terms of procedural design of court hearings, preferred forms of evidence, standard elements to be included in judgments, and the degree to which a court pursues strict or liberal interpretations of the scope of rights established in regional treaties—are most likely to advance human rights in a region, given the general model of human rights change applicable in that region.

At a second level of inquiry, within a more limited scope, we do urge the Inter-American Court and other regional rights courts to consider the social and political dynamics at work in particular countries and cases, to the extent appropriate for an impartial judicial body. While purists might contend that courts must be totally removed from social and political contexts to be fair judicial arbiters, we contend that total isolation is never possible and may be counterproductive to the extent that it leads the court to make incorrect factual assumptions. This consideration is especially relevant, for example, when a court issues reparations orders. Without contextual understanding of a country, the court might issue a reparations order to achieve a certain concrete goal, not understanding that the form of the reparations order is likely to provoke societal backlash. Contextual information and an understanding of the local political

[32] This is not to assert that regional courts are the main tool for eliminating human rights abuses by governments. As noted, in our experience supranational courts constitute just one tool in the broader processes that ultimately lead to lasting human rights improvements, often led by public advocacy campaigns, national courts, and/or nonjudicial mechanisms. Importantly, however, regional courts should operate in the most effective way possible, whether playing a leading or subsidiary role in the broader process of improving particular human rights practices. In this regard, analysts have identified several possible models for how international adjudicatory bodies can best contribute to the advancement of human rights. One vision holds that such bodies should simply provide justice for individual litigants. *See* Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee? in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 15, 32–36 (Philip Alston & James Crawford eds., 2000). A second view, often termed the "constitutional" model, posits that a rights body should seek broader impact by using "appropriate cases to elucidate the [human rights] instrument that they are applying, to interpret and explain it." *Id.* at 39. Variants of the constitutional model focus on the use of emblematic cases to address endemic problems in a given country. *See* Helfer, *supra* note 23, at 135. While we contend that a tribunal such as the Inter-American Court should seek to create impact beyond its cases, we believe that merely elucidating the American Convention will not suffice to reverse the human rights problems in the Americas but that, as a variant to the models above, the Court can best increase its impact by working in ways that are relevant and useful to domestic actors.

climate, by contrast, could lead the court to choose another form of reparations order better suited to achieve the same goal, if an alternative form is available.

In the end, regional human rights courts operate subject to various structural limitations: among others, they lack police authority to enforce their decisions; they often lack resources; and they may exercise jurisdiction over domestic systems in which the rule of law is relatively weak. Nevertheless, they can be relevant forces for advancing respect for human rights. We contend no more than that they should take the steps necessary to maximize their role as contributors to such advancement—steps that will sometimes require these bodies to consider, to the extent compatible with their role as impartial arbiters, how their methods of operation help or hinder the impact of their jurisprudence in the world beyond the confines of their courtrooms.

In the rest of this article, we use the example of the Inter-American Court to analyze the dynamics of supranational tribunals' influence on human rights practices. To this end, we have reviewed the contentious judgments, advisory opinions, decisions on compliance, and recent annual reports of the Court. We have also interviewed numerous practitioners and NGOs to investigate the effects of Court cases in their countries. Other sources of information include interviews and discussions with current and former staff and members of the Inter-American Commission and Court, legal scholarship pertaining to the inter-American and other systems, and secondary sources including media coverage of various cases and their effects. We draw on these data, as well as our significant personal experience with the system, to identify what we believe to be the general dynamics through which Inter-American Court cases influence various human rights practices and to set forth proposals that we hope will contribute to the Court's impact in the years ahead.

II. Overview of the Inter-American System

The inter-American system of human rights protection consists of two bodies created by the Organization of American States (OAS): the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The quasi-judicial Commission acts as the first instance for victims of human rights violations who wish to bring cases before the system. Aside from its role in processing these individual petitions, the Commission undertakes a range of monitoring and promotional activities. The Court, on the other hand, is an exclusively judicial body that issues binding decisions in cases of human rights violations submitted to it by the Commission. In addition, the Court issues advisory opinions and grants provisional measures for the protection of individuals in imminent danger of rights violations.

Litigation before the inter-American system occurs within the legal framework of the main human rights instruments adopted by the OAS: the American Declaration of the Rights and Duties of Man[33] and the American Convention on Human Rights.[34] The Declaration lacks the binding status of a treaty, although the Inter-American Court has held that it applies to all member states of the OAS as the authoritative interpretation of human rights commitments

[33] American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Res. XXX, adopted by the Ninth International Conference of American States (1948), 43 AJIL Supp. 133 (1949), *available at* the Court's Web site, *supra* note 4.

[34] American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123, *available at* the Court's Web site, *supra* note 4.

contained in the OAS Charter.[35] The Convention is a legally binding treaty ratified by most Latin American states. Both instruments set forth a range of fundamental rights; they are complemented by numerous specialized instruments focusing on specific issues such as torture and forced disappearance. States parties to the Convention have the option to recognize the jurisdiction of the Inter-American Court to hear contentious cases against them, and the majority of states parties (twenty-one states) has done so.[36]

The result of this arrangement is that supranational human rights litigation before the system consists of two possible phases. Individuals alleging violations of protected rights by any OAS member state may file a petition before the Inter-American Commission. If the Commission finds the state responsible for the alleged violations, it may issue recommendations to that state concerning reparations and measures to be undertaken to prevent future violations. If, however, the state fails to implement these recommendations, and if it has recognized the contentious jurisdiction of the Inter-American Court, generally or for a particular case, the Commission may forward the case to the Court for a legally binding judgment.

The Inter-American Commission

Created in 1959, the Inter-American Commission[37] is composed of seven independent members who meet during sessions held several times annually for approximately two weeks each, most often at the Commission's headquarters in Washington, D.C. The Commission also carries out on-site visits to evaluate the general human rights situation in member countries; publishes country and thematic reports; organizes human rights seminars, conferences, and meetings; and maintains rapporteurships on various human rights issues.

The Commission has multiple roles in relation to the Inter-American Court. Like member states of the OAS, it has standing to request advisory opinions from the Court interpreting provisions of human rights instruments. It can also request provisional measures on behalf of individuals who face an imminent threat of harm. Most important for our purposes, the Commission receives petitions from individuals alleging violations of rights protected in the system's human rights instruments. The number of complaints received by the Commission has increased significantly; over 1,300 have arrived annually since 2004 (increasing to 1,456 complaints in 2007 alone).[38] Yet the Commission resolves only a small fraction of the matters before it each year. In 2007 the Commission published seventy-four reports in individual cases, sixty-five of which dealt with admissibility alone, and submitted fourteen cases to the Court.[39]

During each period of sessions, the Commission devotes some percentage of its time (generally not more than one-third of its schedule) to public hearings on the admissibility or merits

[35] Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, Inter-Am Ct. H.R. (ser. A) No. 10, at 11, paras. 43–45 (July 14, 1989).

[36] The twenty-one states that have recognized the Court's contentious jurisdiction are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. 2007 IACHR ANNUAL REPORT, *supra* note 4, at 5.

[37] Background information on the Commission is available at the Commission's Web site, <http://www.cidh.org/>.

[38] INTER-AM. COMM'N H.R., ANNUAL REPORT 2007, ch. III, graph B.1.b., Total Number of Complaints Received by Year, *available at* the Commission's Web site, *supra* note 37.

[39] *Id.*, para. 4, & graph B.4.a., Cases Submitted to the Inter-American Court of Human Rights.

of individual cases under consideration. It should be emphasized that even when such hearings are granted (which is by no means the rule), they ordinarily last one hour and are not dedicated primarily to taking live evidence from witnesses. When witnesses do appear, they ordinarily give a brief statement and are not subject to examination or cross-examination. Thus, as currently structured, the Commission's fact-finding process in individual cases cannot be termed judicial. While one might imagine enhancing the procedures of the Commission to enable it to become the authoritative judicial fact-finder of the system, doing so would require significant changes that we do not foresee in the near future.[40]

For cases in which it reaches a merits determination in favor of the petitioners, the Commission transmits its recommendations for remedying the violation in question to the state concerned. However, member states may ignore or otherwise fail to implement these recommendations, in which case the Commission may submit the matter to the Court.

Until 2001, the Commission exercised full discretionary control over whether to submit matters to the Court. For more than two decades, the Commission employed that discretion in few instances, forwarding a growing, but comparatively small number of cases to the Court. Since the entry into force of new Rules of Procedure for the Commission in 2001, the Commission's default procedure has now become to submit cases to the Court.[41] These procedural reforms have more than doubled the number of cases sent to the Court each year, so that from 2004 to 2007 the Commission has forwarded an average of more than one dozen cases to the Court annually.[42] This signifies a dramatic increase in workload for the Court and has led that body to undertake procedural reforms of its own (discussed in part IV below).

The Inter-American Court

The Inter-American Court came into being as the system's binding judicial institution in 1979.[43] Composed of seven judges, the Court holds sessions several times annually for approximately one to two weeks at a time, usually at its seat in San José, Costa Rica, but also, more recently, in various member states that offer to host its sessions. In addition to its jurisdiction over contentious cases, the Court exercises authority to prescribe provisional measures. It may also issue advisory opinions at the request of the Commission, OAS member states, and other organs of the OAS.

For roughly the first decade of its existence, the Court issued only advisory opinions, as the Commission failed to submit a single contentious case to it until 1986. Then, in 1988, the

[40] The possibility of converting the Commission into the binding fact-finder of the system may appeal to some observers because the inter-American system currently uses a duplicative procedure in which the Commission conducts fact-finding and decides the merits of a case, after which, if the case proceeds to the Court, that body also conducts fact-finding to reach its own merits determination. As an initial matter, since the results of domestic investigations or judicial proceedings concerning human rights violations in the Americas are frequently suspect (indeed, these domestic proceedings may form part of the alleged violations in a case), it is clear that despite the cost in resources, the inter-American system must continue to conduct independent fact-finding. We argue that, barring radical changes in the fact-finding resources and procedures of the Commission (a possibility to which we are open but do not think likely to occur soon), the Court must continue to be the authoritative judicial fact-finder of the system. This position does not discount the possibility of other reforms to the relationship between the Commission and the Court.

[41] Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, Art. 44(1), Dec. 8, 2001, *as amended* July 25, 2008, *available at* the Commission's Web site, *supra* note 37.

[42] 2007 IACHR ANNUAL REPORT, *supra* note 4, at 60.

[43] Background information on the Court is available at the Court's Web site, *supra* note 4.

Court issued a landmark judgment on the merits of its first contentious case, *Velásquez Rodríguez v. Honduras*, concerning forced disappearances.[44] During the next decade, the Court addressed first one and then three to four cases annually.

Like the Commission, the Court will not exercise jurisdiction over the merits of a case until it has satisfied itself that certain admissibility requirements have been met. Therefore, litigation before the Court has traditionally consisted of several phases, beginning with consideration of any preliminary objections to admissibility. If admitted, cases have continued to the merits phase, followed by a reparations stage (each phase routinely resulted in a separate decision, although this practice has changed in recent years). In any phase, the Court has the power to convene a public hearing and to receive the testimony of live witnesses.

When the Court determines that a state is responsible for human rights violations, it publishes a judgment setting forth the violations found and orders the state to carry out reparations measures (discussed in parts III and IV below). On the basis of its own interpretation of its mandate, the Court retains jurisdiction to monitor compliance with its judgments and issues periodic compliance orders.[45] As will be seen later, the Court faces considerable difficulties with respect to compliance with certain elements of its judgments. While states generally pay monetary damages, there are very few cases of full compliance, which is notably lacking as regards the obligation to bring perpetrators of violations to justice.

The working methods of the Court have evolved in several ways since the time of its first contentious cases. For instance, originally petitioners did not participate directly in the proceedings. Rather, once the Commission forwarded a case to the Court, it changed roles from neutral arbiter to litigant, representing the petitioners as the sole party opposing the state. In successive reforms to its Rules of Procedure, however, the Court gradually authorized greater participation of petitioners in its proceedings. As a result, today petitioners engage in Court proceedings alongside the Commission,[46] adding a layer of complexity to the Court's work.

The second crucial shift in the Court's operations stems from a dramatic increase in its caseload over roughly the past four years, a direct result of the Commission's procedural reforms of 2001 (see figure 1, p. 782). Since these reforms entered into force, the surge of cases that began reaching the Court has forced it roughly to triple its own rate of case resolution.

To keep pace with this remarkable increase in work, the Court has changed its procedures with a view to greatly shortening the amount of time spent on each case. In addition to combining the various phases of each case (preliminary objections, merits, reparations) into a single judgment, the Court has reduced the average number of days of public hearings devoted to each case and the average number of witnesses appearing in each case before it, changes that we examine in detail in part IV.

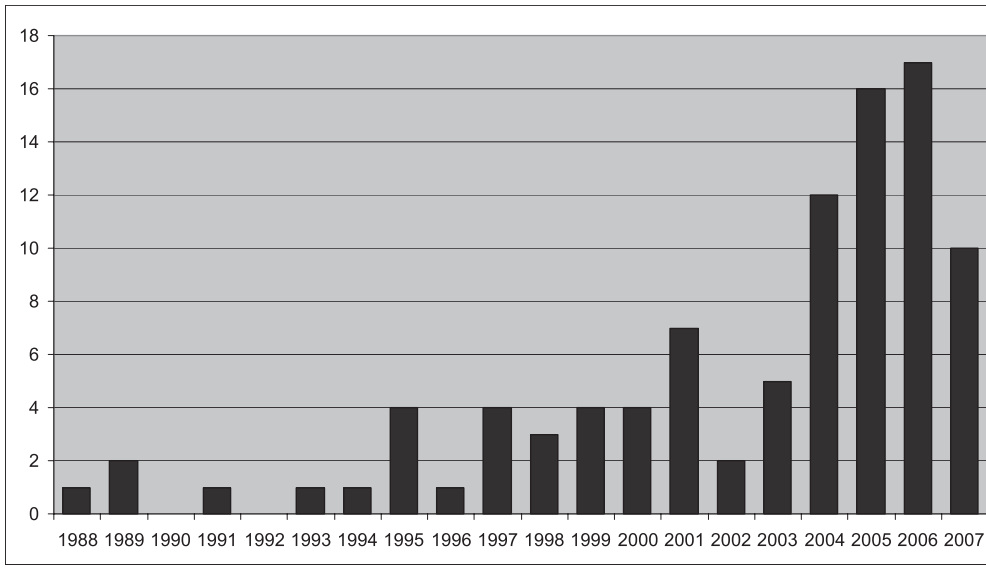
Although the Court now resolves a significantly increased number of cases each year, we emphasize that it remains an organ of extremely limited access for the vast majority of victims of human rights violations. From the Court's inception through the end of 2007, it had issued

[44] Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

[45] *See* Baena Ricardo v. Panama, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, sec. III (Nov. 28, 2003).

[46] Inter-Am. Ct. H.R., Rules of Procedure, Art. 23, Nov. 24, 2000, *as amended* Nov. 25, 2003, *available at* the Court's Web site, *supra* note 4.

FIGURE 1. CASES DECIDED ANNUALLY BY THE INTER-AMERICAN COURT 1988–2007



For the purposes of this graph, a case is counted as decided in the year in which the Court issued a judgment on the merits, or, when the case did not proceed to a merits decision, the year in which it was dismissed or discontinued. The data are from Inter-Am. Ct. H.R., Jurisprudence: Decisions and Judgments, *at* <http://www.corteidh.or.cr/casos.cfm>.

174 determinations in ninety-five contentious cases.[47] From 2004 to 2007 (following the systemic reforms discussed above), the Court resolved approximately fourteen cases annually, including a total of seventeen in 2006. Yet these numbers still represent an average of less than one case per year for each country that has recognized its contentious jurisdiction. Recalling that the Inter-American Commission receives more than thirteen hundred complaints each year—which already represent only a fraction of total victims of rights abuses—it is clear that the fourteen or so cases resolved by the Court each year make up a tiny percentage of the potential cases that would progress through the system if every victim of human rights violations had his or her proverbial day in court.

Despite our emphasis on the limited numbers of victims who are able to reach the Inter-American Court, we do not suggest that this characteristic reflects any deficiency on the part of the Court itself. Considering that thousands of individuals in the Americas continue to suffer human rights violations every year, it is unrealistic to expect a tribunal to hear more than a small percentage of cases. Aside from this inherent limitation, however, the Court contends with external constraints on its power. Namely, as an organ of the OAS, the Court depends on that organization's commitment to carry out its mandate. Yet throughout its existence, the Court has received relatively meager financial and political support from the OAS.[48]

[47] Inter-Am. Ct. H.R, Jurisprudence: Decisions and Judgments, *at* the Court's Web site, *supra* note 4. Following the practice of the Court, we count as one contentious case *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002), which constitutes the joinder of three separate initial applications.

[48] *See* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 343–48 (2003).

This lack of support has not gone unnoticed by those engaged in the system. In 2000 the president of the Court implored the OAS for greater funding, noting that the budget of U.S.$1,114,900 "permits the Court to function only with the minimum of resources, with a consequent deterioration in the services required for the proper operation of the Court. Normally we [are forced to] make cutbacks or eliminate important activities . . . ."[49]

The Commission's procedural reforms and the subsequent dramatic increase in the Court's docket exacerbated these budgetary problems. The judges of the Court underscored that the reforms had been made on the understanding that the OAS would provide funding to cover the inevitable increase in the workload.[50] However, this increase in funding did not occur. The judges of the Court delivered letters to the OAS secretary general warning of "the imminent collapse that will occur beginning in the year 2004 in the work of the Inter-American Court due to the budgetary reductions suffered by the Tribunal."[51] The secretary general dismissed their arguments and stated that the procedural reforms had never included an understanding that the Court's budget would increase to compensate for its growing workload.[52]

As of 2008, the Court's annual budget was U.S.$1,756,300, or 2 percent of the annual budget of the OAS;[53] but this amount would suffice to fund only a portion of the Court's present activities. To continue operating at its current level, the Court depends for a large percentage of its funding on international institutions. For instance, in 2006 the European Union was the main financier of the majority of the Court's sessions.[54]

Another notable contribution to the Court's budget comes from individual Latin American governments. In recent years, such donor governments have included Mexico, Colombia, Brazil, and Paraguay.[55] For a regional human rights tribunal, whose legitimacy depends on maintaining visible independence from member governments, these financial contributions from states facing potential or actual litigation before the Court are, at a minimum, troubling. Moreover, so long as the Court lacks sufficient financial support from its parent organization, it will be dependent on voluntary contributions (whether from individual member states of the OAS or from foreign institutions and governments). As such, its continued viability will turn on the continued willingness of these entities to donate funds, which, of course, is subject to change.

Insufficient budgetary support is not the only indication that the Court lacks strong political backing from the OAS. The OAS has not, for example, responded to repeated calls by the

[49] Inter-Am. Ct. H.R., *Informe a la Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente de la Organización de los Estados Americanos (OEA) en el marco del diálogo sobre el Sistema Interamericano de Protección de los Derechos Humanos* 32 (Mar. 16, 2000), *available at* <http://www.corteidh.or.cr/discursos.cfm>. Note that in this article all translations from documents available only in Spanish or Portuguese are those of the authors.

[50] Letter from the judges of the Inter-American Court of Human Rights to César Gaviria Trujillo, Secretary General of the OAS (Nov. 20, 2003), *reprinted in* Manuel E. Ventura Robles, *La Corte Interamericana de Derechos Humanos: La necesidad inmediata de convertirse en un tribunal permanente*, 1REVISTA CEJIL (Center for Justice and International Law) 12, Annex 1, at 24 (2005), *available at* <http://www.cejil.org/revista/revista_1.pdf> [hereinafter IACHR Letter].

[51] *Id.* at 23.

[52] Letter from César Gaviria Trujillo, Secretary General of the OAS, to the judges of the Inter-American Court of Human Rights (Jan. 16, 2004), *reprinted in* Ventura Robles, *supra* note 50, Annex 2, at 25–26.

[53] 2007 IACHR ANNUAL REPORT, *supra* note 4, at 78.

[54] *See* INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2006, at 6, 13, 16, 18, 19.

[55] *Id.* at 64. In 2006, for example, Mexico donated $125,000 and Colombia announced a contribution of $300,000.

Court to appoint a permanent working group to monitor compliance with Court judgments and provide reports to facilitate discussion of this topic by the OAS General Assembly.[56] Judge Ventura Robles has observed in this regard that the American Convention was largely designed to resemble the European Convention, yet fails to establish one of the components (the Committee of Ministers, which monitors compliance with ECHR judgments) that make the latter viable.[57] The salience of the lack of a permanent monitoring body in the OAS becomes apparent when one considers that eighty-four Court cases (88 percent of resolved contentious matters) were in the phase of supervision of compliance as of the end of 2007, an increase of 162.5 percent since 2003.[58]

III. The Dynamics of Human Rights Advancement in the Inter-American System

As the foregoing overview of the inter-American system suggests, supranational tribunals seeking to strengthen their effectiveness cannot necessarily look to other international courts (such as the ECHR) as models, since the political and institutional environment of one regional system may differentiate it from another. Instead, we argue that supranational courts can maximize their impact by being responsive to the relevant characteristics of the regions over which they exercise jurisdiction. The type of rights violations prevalent in a region, the political climate on the ground, states' general willingness to comply with the court's orders, and the current efforts of local actors and groups working on underlying human rights issues should all shape the procedures and jurisprudential patterns of a court. By understanding how these forces interact to open spaces for the advancement of human rights, a supranational tribunal can design its working methods to provide appropriate tools to the actors best placed to bring about progress within the countries subject to their jurisdiction.[59]

In the paragraphs that follow, we identify what we believe to be the key features of the human rights landscape and possibilities for the advancement of human rights through supranational litigation in the inter-American system.

[56] *See* Antônio A. Cançado Trindade, President of the Inter-Am. Ct. H.R., Hacia la consolidación de la capacidad jurídica internacional de los peticionarios en el Sistema Interamericano de Protección de los Derechos Humanos 28–29 (Presentation Before the Committee on Juridical and Political Affairs of the OAS, Apr. 19, 2002), OEA/Ser.G/CP/CAJP–1933/02 (Apr. 25, 2002), *available at* <http://www.corteidh.or.cr/docs/discursos/01cancado_19_04_02.pdf>.

[57] Caesar v. Trinidad & Tobago, Inter-Am. Ct. H.R. (ser. C) No. 123, at 25, paras. 37–38 (Mar. 25, 2005) (Ventura Robles, J., sep. op.).

[58] *See* Inter-Am. Ct. H.R., Síntesis del Informe anual de la Corte Interamericana de Derechos Humanos correspondiente al ejercicio de 2007, at 5 (Apr. 3, 2008), *available at* <http://www.corteidh.or.cr/discursos.cfm> [hereinafter IACHR Síntesis]. Rather than working to strengthen the enforcement of these judgments, however, OAS member states have been reluctant to raise the matter. CEJIL notes, "Within the OAS, Member States refuse to tackle this issue head-on, not wanting to publicly denounce each other for non-compliance. The prevailing opinion is that if States question the compliance of another Member State, they are infringing on that State's sovereignty." CEJIL, Activities Report 2003–2004, at 42, *available at* <http://www.cejil.org/labores.cfm>.

[59] Indeed, in several important ways, the Inter-American Court's procedures have responded to the particular factors present in the Americas. Thus, given the lack of a committee of ministers to supervise compliance, the Court has developed specific mechanisms for monitoring compliance with its own judgments. *See* Baena Ricardo v. Panama, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, at 33–34, para. 105 (Nov. 28, 2003).

Human Rights in Law and in Fact

Many Latin American countries are characterized by the recognition of a wide range of human rights in legislation, constitutions, and treaty ratifications. However, such legal provisions often do not translate into effective human rights protection on the ground. While the region has emerged from the military dictatorships of the 1970s and 1980s, leading to a reduction in the levels of state-sponsored civil and political rights abuses, widespread violations of fundamental rights continue, ranging from systematic, targeted executions and forced displacement by paramilitary groups in Colombia; to death squad and police killings in Brazil; to military abuses and the use of torture to extract confessions in Mexico; to pervasive extrajudicial violence in Honduras, Guatemala, and El Salvador. In many areas, the rule of law is still solidifying, and in some cases members of the military or of the political party responsible for massive, state-sponsored violations in recent decades continue to hold influential positions in current governments. Moreover, even if the national government of a state attempts to put human rights reforms in place, resistance by local governmental authorities and actors directly involved in abuse often obstructs their implementation.[60] In this climate, the decisions of a supranational tribunal are even less likely to provoke broad change on their own.

State Compliance with Orders of the Inter-American Court

A review of the Inter-American Court's past cases demonstrates that the Court does face frequent nonimplementation of its judgments. Governments may openly reject certain orders, but even more commonly they assert that they will comply or are in the process of complying, yet fail to take the steps necessary to bring their practices into line with the requirements of the Court's judgment.

On finding a rights violation, the Inter-American Court normally orders individual measures of material reparations for the victims (such as the payment of monetary damages), as well as symbolic reparations (usually including an order for the state to hold a public ceremony recognizing its responsibility for the violations). Beyond these measures, which are relatively isolated in scope, the Court also normally orders the state to carry out an effective investigation of the violation or violations in question and to bring to justice all of the perpetrators, a measure designed to end ongoing impunity and deter future abuses. Finally, the Court may order a state to alter its laws, policies, or practices to conform to the American Convention, or to take positive measures (such as providing human rights training to its armed forces) to rectify systematic human rights problems.

Our review of the compliance orders of the Court reveals a clear (though not universal) pattern in states' reactions to its judgments. The pattern that emerges demonstrates that states generally pay some or all of the monetary damages awarded by the Court. In addition, states may comply with symbolic reparations, including those concerning public ceremonies. However, when it comes to more far-reaching measures to reduce impunity and advance human rights (such as prosecuting past violations or changing laws and practices), compliance is considerably less likely. Most salient, virtually no compliance decision records that a state has effectively investigated and punished the perpetrators of a human rights violation forming the basis of a

[60] *See* James L. Cavallaro, *Toward Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil*, 3 CHI. J. INT'L L. 481, 489 (2002).

Court decision.[61] Even when states report taking some steps toward a full investigation of the case or having prosecuted some of the alleged perpetrators, they often do not progress to investigating fully or prosecuting all the parties involved, weakening the impact of those legal processes in combating impunity.[62] States also frequently fail even to provide the Court with the data necessary to determine whether the state is complying with a judgment or not. In 2003 Panama challenged the principle that the Court even has the authority to monitor compliance with its orders.[63] As of 2007, the Court reported full compliance in only 11.57 percent of resolved cases.[64]

The picture that emerges from interviews with human rights groups regarding the Court's substantive impact on human rights issues is also troubling. To provide just a few examples, with respect to the cases of *Blanco Romero v. Venezuela* and *Montero Aranguren v. Venezuela*,[65] involving, respectively, forced disappearances and a prison massacre, the state has yet to comply fully with any part of the judgments.[66] Meanwhile, in the first half of 2007, the level of violence occurring in Venezuelan detention facilities—the problem at issue in *Montero Aranguren*—increased.[67] In Paraguay, two cases in the past few years, *Yakye Axa Indigenous Community v. Paraguay* and *Sawhoyamaxa Indigenous Community v. Paraguay*,[68] have brought before the Court the issue of indigenous communities' right to their traditional lands. In these cases, the displacement of indigenous communities from their lands caused their members to live in deplorable conditions and sometimes to die as a result of the state's subsequent failure to provide necessary medical services.[69] Yet the state has not complied with the most important element of the Court's determinations on reparations: giving possession of the lands to the

[61] *See* Cerna, *supra* note 25, at 203–04 (stating that "only in the rarest case is [the state] willing to investigate, try and punish the perpetrators, and in those rare cases where it does punish them, they tend to be released from prison after short periods, or never serve prison terms at all").

[62] One could argue that prosecution of all perpetrators is not, a priori, the most relevant indicator of the Court's impact, particularly when significant time and resources would be required to prosecute a particular defendant. However, given the central role that persistent impunity for human rights abuses has played in Latin America; the symbolic, deterrent value of punishing perpetrators in high-profile cases, such as many of those that reach the Inter-American Court; and the high importance placed on accountability by victim populations (as seen in very clear forms in, e.g., continuing efforts to hold accountable participants in the "dirty wars" of countries such as Argentina and Chile), we consider this element of reparations orders important in achieving progress in long-term respect for human rights and thus a highly relevant factor in evaluating compliance with the orders of the Court. Additionally, while in certain cases a failure to prosecute may result from the practical difficulties in locating an individual or other internal constraints, the extremely low level of full compliance in this regard strongly suggests a recurrent lack of political will to enforce this aspect of the Court's decisions.

[63] *Baena Ricardo*, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, at 10–13, para. 54 (Nov. 28, 2003).

[64] IACHR SÍNTESIS, *supra* note 58, at 9.

[65] Blanco Romero v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 138 (Nov. 28, 2005); Montero Aranguren v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

[66] Telephone interview with María Daniela Rivero, Comité de Familiares de las Víctimas de los sucesos ocurridos entre el 27 de febrero y los primeros días de marzo de 1989 (Oct. 17, 2007). This lack of compliance continues at the time of this writing.

[67] Gustavo Rodríguez, *241 Presos han sido asesinados durante el primer semestre*, EL UNIVERSAL.COM. (Venez.), July 4, 2007, <http://buscador.eluniversal.com/2007/07/04/sucgc_art_241-presos-han-sido_345395.shtml>; Yolimer Obelmejías Valdez, *Denuncian aumento de 31% de violencia en cárceles venezolanas*, EL UNIVERSAL.COM., Aug. 6, 2007, <http://buscador.eluniversal.com/2007/08/06/pol_ava_denuncian-aumento-de_06A911051.shtml>.

[68] Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

[69] *Yakye Axa Indigenous Community,* Inter-Am. Ct. H.R. (ser. C) No. 125, at 2, para. 2; *Sawhoyamaxa Indigenous Community,* Inter-Am. Ct. H.R. (ser. C) No. 146, at 1–2, para. 2.

communities.[70] The Court noted in February 2007 that since the publication of the judgment in *Sawhoyamaxa*, the state's failure to implement its orders on providing basic services to the community had led to the deaths of four additional individuals and the hospitalization of five more.[71]

The examples listed above should not detract from the Court's achievements in other cases, which induced states to change laws and policies in response to Court judgments. A notable case in this regard is *Barrios Altos v. Peru*,[72] in which the Court's declaration that Peru's amnesty laws (covering crimes committed under the regime of Alberto Fujimori) were incompatible with the American Convention led to criminal proceedings against numerous human rights violators previously shielded from prosecution in Peru.[73] The Court's judgment in *Suárez Rosero v. Ecuador*[74] triggered reforms of provisions of Ecuador's penal code dealing with drug offenses, ultimately contributing to the release of many persons who had been detained for prolonged periods without trial or sentencing.[75]

Moreover, sometimes state institutions do comply with the Court's orders even when domestic factors could be expected to create resistance. In *Bulacio v. Argentina*, the Inter-American Court ordered Argentina to prosecute a police captain regardless of domestic extinguishment of the criminal action against him.[76] Argentina's Supreme Court voiced its disagreement with aspects of this judgment, noting that it appeared unduly to restrict the rights of the defendant and that it did so on grounds not of an independent determination of the facts but, rather, of the procedural fact of Argentina's international acknowledgment of responsibility before the Inter-American Court.[77] Nonetheless, the Supreme Court stated that "in spite of the reservations expressed here, it is the duty of this Court, as part of the Argentine State, to comply [with the judgment of the Inter-American Court]."[78]

[70] Telephone interview with Julia Cabello, Tierraviva a los Pueblos Indígenas del Chaco (Sept. 18, 2007); *Yakye Axa Indigenous Community,* Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 8, 2008); *Sawhoyamaxa Indigenous Community,* Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 8, 2008).

[71] *Sawhoyamaxa Indigenous Community,* Compliance with Judgment, *Considerando,* para. 11 (Inter-Am. Ct. H.R. Feb. 2, 2007).

[72] Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

[73] *See Barrios Altos*, Cumplimiento de Sentencia, para. 15 (Inter-Am. Ct. H.R. Sept. 22, 2005), *available at* <http://www.corteidh.or.cr/docs/supervisiones/barrios_22_09_051.pdf>; International Federation for Human Rights, *Fujimori: ¡Extradición al Perú o Juicio en Chile!* LA LETRA, NO. 476/3, May 2007, at 6, *available at* <http://www.fidh.org/IMG/pdf/peru.pdf>.

[74] Suárez Rosero v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 35 (Nov. 12, 1997).

[75] *See* Tribunal Constitucional, Resolución No. 119-1-97 (Dec. 24, 1997), *available at* <http://www.consep.gov.ec/> (declaring unconstitutional a provision of the penal code relating to pretrial and presentencing detention); UN Human Rights Committee, Información adicional presentada por el Estado Parte: Ecuador, UN Doc. CCPR/C/84/Add.8, para. 102 (Dec. 17, 1998) (describing the effects of this declaration), *available in English at* <http://documents.un.org/simple/asp>.

[76] Bulacio v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 100, at 48–49, paras. 116–17 (Sept. 18, 2003).

[77] Corte Suprema de Justicia [CSJN], 23/12/2004, "Espósito, Miguel Angel s/ incidente de prescripción de la acción penal promovido por su defensa," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2004-327-5668), paras. 12–15, *available at* <http://www.csjn.gov.ar/>. The Supreme Court noted that because of this procedural resolution, the Inter-American Court had declined to consider expert evidence offered on the facts of the case. *Id.,* para. 15. We critically examine acknowledgments of responsibility and their relationship to the exclusion or limitation of evidence in part IV *infra.*

[78] *Id.,* para. 16. The relevant criminal case is ongoing. For further examples of domestic jurisprudence citing inter-American instruments and decisions, see Brian D. Tittemore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW.

As these examples demonstrate, not all cases are alike. In some countries, on some issues, the Court can directly trigger a change in laws or practices; and even in cases lacking full compliance, a Court judgment can nonetheless prompt the repeal of a violatory law or otherwise have a significant impact on a key human rights issue. In addition, actors within some national governments have undertaken initiatives to promote implementation of Court decisions. For instance, in 2007 Ecuador's attorney general introduced a bill that would establish automatic procedures for such implementation.[79]

In more cases than not, however, the Court continues to confront problems in achieving meaningful and lasting implementation of its reparations orders. Lack of political will and the powerful position of the armed forces and police in various Latin American countries mean that the Court often faces particular difficulties in prompting states to punish the authors of past violations, a crucial challenge given the role of impunity in perpetuating tolerance for human rights violations. Governments may also be reluctant to deploy the resources necessary to carry out the systematic reforms needed to correct endemic human rights problems. This situation is complicated by the fact that states are not monolithic; even if a country's supreme court or national government is receptive to inter-American jurisprudence, resistance by the local authorities actually responsible for day-to-day implementation of ordered reforms may stymie efforts to advance human rights in practice.

The Ingredients of a Successful Case: Supranational Litigation as an Advocacy Tool

Rather than stemming directly from Court orders, advances in the human rights practices of numerous Latin American societies have historically depended, in our view, on the ability of social movements and human rights advocates on the ground to exert pressure on authorities to implement change. The coordinated, long-term advocacy strategies necessary to achieve such pressure may involve grassroots organization and mobilization; use of the media and other strategies to engage public opinion; cooperation with transnational advocacy networks to trigger international shaming; and the litigation of emblematic cases, sometimes including use of the inter-American system. Within this framework, a comparison of the success of several Inter-American Court cases illustrates the power of domestic activists to deploy the inter-American system to advance a campaign.[80] Conversely, we suggest that inter-American jurisprudence that does not fit within a larger campaign is unlikely to trigger concrete benefits on the ground when governmental authorities are resistant to the judgment.

The influence of media attention and public support. In 1997 the Court considered the case of *Loayza Tamayo v. Peru*.[81] The case arose from the 1993 detention of Professor María Elena

J. L. & TRADE AM. 429, 449–61 (2006). The existence of such jurisprudence is a positive indication of the inter-American system's influence. At the same time, this cannot serve as the only criterion for studying the Court's impact. Domestic judgments that involve progressive jurisprudence or call for large-scale reforms may themselves suffer from a lack of implementation when political will is lacking in other governmental institutions.

[79] *See* Comisión Especializada Permanente de lo Civil y Penal, Ley Orgánica para la Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos e implementación de acuerdos amistosos y de cumplimiento ante la Comisión Interamericana, Oficio No. 153–CEPCP–P–07 (Nov. 15, 2007), *available at* <http://apps.congreso.gov.ec/sil/documentos/informes/574.doc>.

[80] More detailed versions of the first two case studies that follow (based on the cases *Loayza Tamayo v. Peru* and *Castillo Petruzzi v. Peru*) appear in James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 245–49 (2004).

[81] Loayza Tamayo v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

Loayza Tamayo, accused of association with Peru's Sendero Luminoso (Shining Path) insurgent group.[82] Loayza Tamayo was subjected to incommunicado detention, physically and psychologically abused, and eventually sentenced by a faceless tribunal to twenty years' imprisonment for terrorism.[83] The Court found that Peru had violated the victim's rights and ordered the state to release her.[84] Even though Peru (then under Fujimori) routinely resisted the Court during this period,[85] the government released Loayza Tamayo within a month.[86]

The Court decision, however, was far from the only element of the campaign to free Loayza Tamayo. From the time of her arrest and continuing for four years, her case generated both widespread popular support and media attention within and beyond Peru.[87] She maintained her innocence, helping to make her a sympathetic victim whose plight resonated with the public when reported through the media.

Two years later, in *Castillo Petruzzi v. Peru*, the Court dealt with a similar case in which the victims (four Chilean nationals) were sentenced to life imprisonment by a faceless tribunal.[88] The Court ordered that they be retried with full due process guarantees;[89] but this time the Court's judgment met with a different reception. As foreign nationals accused of committing violent crimes in Peru, the victims failed to generate the public support and sympathetic media coverage that had characterized the *Loayza Tamayo* case. In this climate, not only did the government refuse to comply with the *Castillo Petruzzi* judgment, asserting that the Court's orders were an intrusion upon state sovereignty,[90] but the Peruvian Congress approved a resolution attempting to retract Peru's recognition of the Court's jurisdiction.[91]

These two case studies illustrate the role that media and public support can play in pressuring a state to comply with supranational orders in favor of victims. This particular pair of cases yielded very different results at the level of the individuals concerned and, more broadly, generated different types of public dialogue and outcomes with regard to state engagement in the inter-American system.[92]

[82] *Id.* at 2–3, 21–24, paras. 3, 46.

[83] *Id.*

[84] *Id.,* sec. XVIII, at 31–35.

[85] *See, e.g.,* Castillo Petruzzi v. Peru, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 41, at 24, para. 100(a) (Sept. 4, 1998) (quoting Peru's assertion that "the sovereign decision of the legal organs of Peru cannot be modified much less rendered ineffective by any . . . international authority"); *Castillo Petruzzi,* Inter-Am. Ct. H.R. (ser. C) No. 52, at 63, para. 216(f) (May 30, 1999) (quoting Peru's statement that the Inter-American Court "does not have the right to order that criminals be released").

[86] *Loayza Tamayo*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 42, at 2, para. 4 (Nov. 27, 1998). The state challenged and refused to comply with various other reparations orders in the case. *Loayza Tamayo,* Compliance with Judgment, Inter-Am. Ct. H.R. (ser. C) No. 60 (Nov. 17, 1999).

[87] In 1995 Loayza Tamayo was able to send a letter from prison to Amnesty International describing how she had been raped and otherwise tortured during her detention. Amnesty Int'l, *Peru/Japan*, *Alberto Fujimori Ex-president of Peru Must Be Brought to Justice,* AI Index AMR 46/017/2001 (2001), *available at* <http://www.amnesty.org/en/library/info/AMR46/017/2001/en>.

[88] *Castillo Petruzzi*, Inter-Am. Ct. H.R. (ser. C) No. 52, at 1, 20–31, paras. 1, 86 (May 30, 1999).

[89] *Id.,* sec. XVII.

[90] *Castillo Petruzzi*, Compliance with Judgment, Inter-Am. Ct. H.R. (ser. C) No. 59, at 3, para. 3 (Nov. 17, 1999).

[91] Legislative Res. No. 27152 (July 8, 1999); *see* Letter from Fernando de Trazegnies Granda, Minister for Foreign Affairs, Republic of Peru, to César Gaviria, Secretary General, OAS (July 8, 1999), *available at* <http://www.umn.edu/humanrts/iachr/Annuals/app16-99.html>.

[92] The situation with regard to *Castillo Petruzzi* would change several years after Fujimori left power. In 2003, a time when rejection of Fujimori's abuses was of growing importance in public opinion, Peru's Constitutional

As another example, in *Yean and Bosico v. Dominican Republic*,[93] the Court considered the state's discriminatory failure to provide two children of Haitian descent with birth certificates. The case occurred against a backdrop of entrenched prejudice and social exclusion of persons of Haitian descent in the country.[94] This climate had made it difficult for domestic activists to mobilize widespread public pressure for the equal treatment of such persons. The Court's finding in favor of the petitioners thus met with backlash from the public.[95] The secretary of foreign relations issued a document stating that the government questioned the procedures and outcome of the inter-American case, leading to speculation in 2007 that despite having paid monetary reparations to the victims, the state did not intend to reform its law and practice to comply with the Court judgment.[96]

By contrast, public support and preexisting advocacy efforts on an issue can help to ensure that governments will be receptive to Inter-American Court judgments that seek to move the issue forward. As we discuss in part IV below, the evolving public attitude toward amnesty laws in the region was a factor that promoted implementation of the Court's decision in the *Barrios Altos* case, mentioned above.

Government actors and human rights advocacy. Domestic pressure to comply with Court judgments and to reform underlying human rights problems can also come from individuals or institutions within a state's government. Cases in which a Court judgment complements and fits into ongoing advocacy efforts by such stakeholders have generally led state actors to pay greater attention to changing relevant policies. One such case, *Ximenes Lopes v. Brazil*,[97] concerned a killing in a psychiatric clinic operating pursuant to a contract with Brazilian authorities in Ceará State. Before the Inter-American Commission, the *Ximenes Lopes* case attracted the support of the Ceará legislature's human rights commission, a major Brazilian human rights organization, psychiatric professionals, and the media. By the time the case progressed to the Court, efforts by domestic stakeholders, including local and national health commissions, had already fostered an ongoing shift from an internment model of mental health care to a system focused on outpatient care and increasing respect for patients' rights. This context of reform brought about a greater focus on the underlying issues of mental health policy before the Inter-American Court. Brazil presented testimony regarding steps it had taken to

Court cited *Castillo Petruzzi* in its landmark decision to strike down several pieces of antiterrorist legislation. *See* Constitutional Court, 01/03/2003, "Marcelino Tineo Silva y más de 5,000 ciudadanos," Exp. No. 010–2002–AI/TCLIMA, *available at* <http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html>. Later that same month, Peru at last opened a new trial for the victims in *Castillo Petruzzi*. *See, e.g., New Trial Opens for Chileans Imprisoned in Peru on Terrorism Charges,* AP, Jan. 30, 2003, *available at* <http://www.highbeam.com/doc/1P1-71400211.html>.

[93] Yean and Bosico v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

[94] *See id.* at 25, para. 85(b)(1).

[95] *See* Juan Bolívar Díaz, *¿Haitianos, dominicanos ó domínicohaitianos?* EL DIARIO HOY, Oct. 16, 2005, *available at* <http://www.clavedigital.com.do/App_Pages/Portada/Titulares.aspx?Id_Articulo=6231> (reporting that most Dominicans who knew of the judgment had strong negative reactions).

[96] Diógenes Pina, *República Dominicana: Acatamiento parcial a Corte Interamericana*, INTER PRESS SERV., Mar. 23, 2007, *available at* <http://ipsnoticias.net/interna.asp?idnews=40469>. At the same time, the Court's decision appears to have galvanized international concern over the plight of Dominicans of Haitian descent. In 2007 Dominican activist Sonia Pierre received the Robert F. Kennedy Human Rights Award. *See* Marc Lacey, *A Rights Advocate Whose Work Divides Dominicans,* N.Y. TIMES, Sept. 29, 2007, at A4. A coalition of NGOs in Washington has also taken up the issue. Interview with Michael Camilleri, staff attorney, CEJIL, Washington, D.C. (Oct. 11, 2007). It remains to be seen whether these developments will produce change on the ground.

[97] Ximenes Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

reduce the frequency of confinement of patients and to restructure its national mental health program.[98] The Court case, in turn, stimulated fresh debate within Brazil about public health policy.

Supranational litigation can also support human rights advocacy by individual governmental actors. Former judge of the Inter-American Court Thomas Buergenthal provides two vivid examples. In one case, the Court issued an advisory opinion holding that a Costa Rican law requiring all journalists to belong to an association was incompatible with the American Convention.[99] The law, however, remained in force until former president of the Court Rodolfo Piza was named to the new Constitutional Chamber of Costa Rica's Supreme Court; soon thereafter, that body annulled the law.[100] Likewise, Honduras delayed in complying with the monetary damages due in the Court's first contentious cases, *Velásquez Rodríguez* and *Godínez Cruz v. Honduras*, until former Court judge Carlos Roberto Reina became president of Honduras.[101] While extreme cases such as these are rare, the point to be made is that governments and their agencies are not unitary actors; it is not uncommon for certain individuals within a government to have a far greater commitment to advancing human rights agendas than that reflected in the state's current policy and practice. For such individuals, an Inter-American Court judgment may help them push colleagues to implement changes. Key to this process, as we argue later, is for Court judgments to be well-grounded and sensitive to domestic factors that could provoke a backlash.

The role of international pressure in reducing systematic violations. Finally, while we have emphasized the role of domestic actors, broader advocacy campaigns may also involve pressure from international institutions. Scholars Margaret Keck and Kathryn Sikkink point to the evolution of the former Argentinean military dictatorship's human rights practices, for example, in articulating their *boomerang theory* of international influence on domestic human rights situations.[102] Under this theory, domestic advocates employ international allies to shame and pressure a government on the global stage, amplifying domestic groups' own demands and ultimately serving to "echo back these demands into the domestic arena."[103] Keck and Sikkink highlight the role of international human rights NGOs, foreign governments, the Inter-American Commission, and the international press[104] in forcing a greater degree of openness and eventually improvements in the human rights practices of Argentina's military government.[105]

Professor Sonia Cardenas takes a more skeptical and nuanced view of the international community's influence on the military dictatorships in Argentina and Chile.[106] While

[98] One of the witnesses presented by Brazil was Pedro Gabriel Godinho Delgado, National Coordinator of the Mental Health Program of the Ministry of Health. Godinho Delgado's testimony focused on measures taken by the state to increase outpatient care, as opposed to confinement, as well as measures designed to promote and respect human rights within the mental health system. *See id.*, para. 47.3.b.

[99] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 5 (1985).

[100] Buergenthal, *supra* note 26, at 268–69.

[101] *Id.* at 272.

[102] MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); *see, e.g.*, *id.* at 107.

[103] *Id.* at 13.

[104] *Id.* at 105–07.

[105] *Id.* at 109.

[106] SONIA CARDENAS, CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE (2007); *see, e.g., id.* at 38–39.

acknowledging that pressure led to improved human rights practices in these countries in the 1970s,[107] Cardenas emphasizes that international human rights influence is limited by the presence of internal national security threats and pro-violation constituencies.[108] Even after international pressure rose against Chile, for instance, the use of torture increased in 1979 and 1980.[109] Similarly, as Argentina was publicly committing itself to international norms in 1977, over three thousand disappearances took place and the government opened four new clandestine detention centers.[110] Cardenas thus argues that international pressure is effective only when it fills the void previously occupied by real or manufactured national security threats.[111] In Chile, violations declined in 1976 only after armed confrontations with leftist groups subsided. Similarly, the largest decline in violations in Argentina followed the dismantling of internal armed groups in 1977 and 1978.[112] Drawing on these observations, Cardenas concludes that international pressure campaigns, to the extent that they have the power to bring about change on the ground, will be most effective when they take advantage of strategic openings for advocacy and are tailored to the unique domestic conditions of the violating state.[113]

The data cited by Cardenas underscore that international pressure in isolation is unlikely to advance the human rights situation in states resistant to the authority of international obligations. However, according to both Keck and Sikkink's boomerang theory and Cardenas's understanding, an integrated advocacy campaign involving the deployment of targeted international pressure at strategic moments can enhance the power of domestic advocates and other political actors to bring about change.

The Role of the Court: Relevance to Domestic Activists

We wish to make clear that we do not suggest that a supranational tribunal should limit itself to hearing popular cases or matters in which the victims already enjoy support from the public, international human rights bodies, or other sources. Quite the contrary: it is often the role of human rights litigators to represent individuals marginalized by society or overlooked by the international community. Our point is simply that tribunals will be most effective when they understand the specific dynamics of change in a country or region. Experience indicates that advancement of human rights in many Latin American countries is most likely when positive media coverage, public support, and/or international pressure can be brought to bear on a given issue.

With the caveat that each country and case comes with a specific set of factors, we now conclude this section by introducing (and in some cases reiterating) several of the specific advocacy tools that we argue the Court should bear in mind when considering a case.

Public Court proceedings: a focal point for media advocacy. As already mentioned above, one of the highly valuable outcomes of an Inter-American Court case for petitioning NGOs is the accompanying media coverage that the case may generate. One of the authors has previously

[107] *Id.* at 65.
[108] *Id.* at 27–28.
[109] *Id.* at 67–68.
[110] *Id.* at 69.
[111] *Id.* at 83.
[112] *Id.* at 82.
[113] *Id.* at 134.

observed, on the basis of years of litigating before the inter-American system as the director of various human rights organizations in Brazil, that the impact of inter-American decisions in that country has varied not according to their content but, rather, in accordance with the degree of pressure brought to bear by the public and especially by the media.[114]

In this regard, public hearings held by the Inter-American Court provide a focal point for media attention immediately before, during, and after their occurrence, and can strengthen the perceived legitimacy of a cause by serving as a forum for victims and civil society groups to tell their stories and debate respondent states. Compelling victim testimony, in particular, may give rights violations a human face and counteract the otherwise negative public or media perception of certain unpopular groups (such as prisoners) who are victims of human rights violations.[115] We thus suggest that the media attention inherent in public hearings may help to generate popular support and compliance pressure around a case.

Full and accurate factual record. As observed above, the European system prior to the early 1990s dealt primarily (if not exclusively) with nonviolent human rights violations. Moreover, in many cases the facts were largely undisputed.[116] Historically, therefore, the ECHR has not had to devote a significant percentage of its time to fact-finding and, particularly when considering cases against well-established democratic states, has often been able to take the results of domestic judicial processes as dispositive of the facts of a case.[117]

In the inter-American system, by contrast, the types of human rights violations alleged have, on the whole, been more violent and are likely to involve complex patterns of facts, requiring proof not only of the physical occurrences alleged, but also of the level of state knowledge of or participation in these events, as well as the role of authorities in their investigation. Respondent states have often denied at least some of the petitioners' factual allegations, arguing, for example, that a massacre was in fact a confrontation between two armed parties or that their investigation of the facts was done in good faith. Finally, the offending state may well acknowledge the specific violations alleged in the case but deny that they form part of a larger pattern of violations (a trend that we discuss in detail below).

We argue that what is required in all of these cases is for the Court to set forth a complete narrative of the facts, providing advocates with an authoritative record to use in their campaigns and preventing governments or their supporters from putting forth alternative factual

[114] Cavallaro, *supra* note 60, at 487.

[115] Victim testimony may also greatly benefit victims themselves, providing them with the chance to tell their stories in a neutral, authoritative forum. Because this article focuses on the wider advocacy impact of Court decisions, we do not discuss in depth the potential loss to victim witnesses that accompanies the Court's procedural reforms. We note, however, that this is another cost to be considered in evaluating the reduction in the use of public hearings by the Court, as discussed in text below.

[116] Speaking in the early 1990s, Professor Jochen A. Frowein noted that in the vast majority of cases to come before the European system, "the documents produced by both parties lead to a non-controversial establishment of the facts." Jochen A. Frowein, *Fact-Finding by the European Commission of Human Rights*, *in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 237, 238 (Richard B. Lillich ed., 1991).

[117] One ECHR judge reported in 1997 that when dealing with established democracies, the ECHR has generally been able to accept the findings of domestic courts as true; however, this rule did not necessarily hold for Turkey or for newly entered Eastern European states. *See Visita de la Corte Europea de Derechos Humanos (noviembre de 1997, extractos de los debates), in* 2 INTER-AM. CT. H.R., INFORME: BASES PARA UN PROYECTO DE PROTOCOLO A LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS, PARA FORTALECER SU MECANISMO DE PROTECCIÓN 501, 509 (Antônio Augusto Cançado Trindade ed., 2d ed. 2003), *available at* <http://www.corteidh.or.cr/docs/libros/Semin2.pdf>.

accounts later.[118] Importantly, the scope of facts proven before the Inter-American Court determines the scope of facts that the state is obligated to investigate under the ensuing reparations orders.[119] Even when the state acknowledges responsibility for the violations, the advocacy value in setting forth a narrative of the facts may be considerable.[120]

Most significant, because advocacy power, and not necessarily technical legal points, often influences the effectiveness of a Court judgment, it is not enough for the Court to declare that it has sufficient legal justification to find a violation. Instead, it is crucial for the Court to deploy rigorous fact-finding processes to determine as far as possible the precise facts underlying the violation, as the difference in advocacy and media impact between competing versions of the facts (for instance, one version in which the state fails to protect a victim from third-party violence as against another version in which state agents carry out an extrajudicial execution) may be enormous.[121] Likewise, by identifying illegitimate actions by specific actors or deficiencies in specific institutions, the Court may provide helpful guidance in efforts to strengthen domestic human rights practices.[122] For these reasons, we emphasize the importance of an authoritative factual record in maximizing the impact of Court judgments.

Grounded jurisprudence. An appreciation of the role of supranational tribunals in advancing respect for human rights also has implications for the style of jurisprudence that will maximize a court's impact on the ground. In an ideal system in which governments followed all supranational orders, the style, length, and innovative character of a court's jurisprudence would perhaps not matter. In the inter-American system, this is not the case. Instead, the degree to which domestic human rights advocates, government insiders, and others can make use of a Court judgment will generally depend on its relevance, reasoning, and awareness of the political situation in a country. In particular, it is essential for the Court to avoid (to the extent possible) jurisprudential elements likely to provoke public or governmental backlash.

We certainly do not suggest that supranational human rights courts should sacrifice impartiality for political reasons; indeed, for such institutions to be effective, they must demonstrate their integrity as politically neutral arbiters. Within this framework of political independence, however, supranational courts nevertheless exercise some degree of discretion over the exact form that their judgments take. Such discretion may include, for instance, whether to discuss

[118] Importantly, a Court's perceived fact-finding abilities make a crucial contribution to its legitimacy. Helfer and Slaughter state, "An important dimension of [a human rights court's] powers is the ability to elicit credible factual information on which to base the tribunal's decisions. A guaranteed capacity to generate facts that have been independently evaluated, [e.g.,] through the public contestation inherent in the adversary system, helps counter the perception of self-serving or 'political' judgments." Helfer & Slaughter, *supra* note 8, at 303.

[119] *See* Tatiana Rincón Covelli, *La verdad histórica: una verdad que se establece y legitima desde el punto de vista de las víctimas*, 7 ESTUDIOS SOCIO-JURÍDICOS 331, 340–41 (spec. ed. 2005) (Colom.).

[120] Indeed, the Court has placed increasing importance on setting forth a narrative of facts even in cases of acknowledgment of responsibility, as discussed in part IV *infra*.

[121] In some cases, certain facts may remain unclear even after rigorous fact-finding. In such situations, the Court may have sufficient proof to declare, e.g., a violation based on failure to protect but not to declare direct responsibility for the original violation (such as a killing). We do not suggest that every example of this type indicates deficient fact-finding; rather, in some cases it will be the best outcome that the petitioners can achieve if there are true obstacles to clarifying the underlying facts. Note also that we intend the phrase "rigorous fact-finding" to denote a process that determines as precisely as possible the facts of a case, regardless of whether these facts turn out to support the petitioners or the state.

[122] For example, the international NGO and inter-American litigant CEJIL notes the value of the Court's establishment of the specific military unit responsible for the victim's death in *Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003). CEJIL, *supra* note 58, at 27.

issues not necessary to the holding of a case; the precise form that reparations should take; and (to some extent) whether to expand upon the previous understanding of a right. In this regard, we believe that courts enhance their effectiveness to the extent that they recognize political realities on the ground and are able to tailor their decisions to maximize the potential for positive impact.

The need for impact beyond the facts of the case. Finally, each supranational human rights case must be viewed as an opportunity to leverage strategic pressure in favor of broad social impact. While hardly a radical or novel idea in itself, this view of supranational litigation bears emphasizing in light of the extremely small fraction of total cases reaching the Inter-American Court each year. Viewed in this context, a case resolved in a manner that gives reparations to the individual victim but fails to provide support for campaigns on behalf of much larger populations is a missed opportunity. This notion is not meant to minimize the significant value in giving justice to the individual victim; but considering the equally urgent situation of the hundreds or thousands of victims whose cases will never be heard by it, the Court, as both a moral and a practical matter, must use each case that comes before it as an opportunity to advance the broader issue underlying the litigation.

Bearing these general principles in mind, we turn to a survey of the current procedures and jurisprudence of the Inter-American Court.

IV. Streamlining Its Work or Straying from Its Strengths? Current Practices of the Inter-American Court

A survey of recent trends in the practice of the Inter-American Court raises concerns that a growing docket and continuing financial limitations may be hampering the tribunal's ability to achieve the goals discussed immediately above most effectively. In particular, in its efforts to cope with its steeply increased caseload and to respond to states' changing litigation tactics, the Court has adopted new procedures that reduce the use of public hearings, witness testimony, and (in some cases of state acknowledgments of responsibility) adversarial argument concerning the merits of a case. These changes potentially weaken several of the Court's most useful functions, such as producing detailed factual records and generating media and public pressure on human rights issues. At times in recent years, the Court has also issued visionary or philosophical jurisprudence that suggests an insufficient appreciation of local political conditions.

The Court has already recognized some aspects of these broad trends as problematic and has taken positive measures to counteract some of their potentially negative consequences (discussed below). At the same time, the Court remains largely focused on processing increased numbers of cases, leaving it with little time for a critical evaluation of any negative effects of its overarching shift in operations.[123]

Until increased funding is made available, the Court will face real trade-offs in deciding how to allocate its resources. Moreover, it faces pressure to avoid backlogs of cases, and we hesitate to suggest a course of action that might delay justice for victims. However, as discussed in detail

[123] We recognize, of course, that the Court's remarkable increase in the number of cases heard and the speed with which decisions are issued may have beneficial effects for individual victims. As we discuss below, however, we worry that actors within the system may be overlooking any price paid for these gains. We believe that, at a minimum, critical evaluation of the Court's new procedures is warranted.

below, the negative advocacy impact of even a single case processed with insufficient time dedicated to rigorous fact-finding or other elements may have severe consequences for the activities of domestic advocates. Thus, while we do not argue that the Court should apply more resource-intensive procedures to every case or even most cases, we do urge it to retain the flexibility to consider each case with an eye to identifying those for which greater resources are required.

Finally, striking an appropriate balance between giving attention to each individual case and coping with an expanding docket is not a challenge unique to the inter-American system. The European Court, for instance, faces an overwhelming docket of its own. The number of applications allocated annually to the decision bodies of the ECHR has increased from 10,500 in 2000 to 41,700[124] in 2007, with 79,400 applications pending at the end of 2007, an increase of 19 percent from the year before.[125]

In its continuing efforts to handle this enormous caseload, the Council of Europe in 2004 adopted Protocol 14 to the European Convention, streamlining its procedures by, inter alia, reducing the number of judges dealing with various matters. Under this protocol, a single judge may declare an application inadmissible (instead of a committee of three) and committees of three judges (instead of chambers of seven) may render judgments on the merits of cases when these can be resolved under established case law.[126] Currently, all but one member state (Russia) has ratified this protocol, which requires universal ratification to enter into force. The urgency with which the European Court views its expanding docket is clear in the statements of its president, Jean-Paul Costa, who stated at the ECHR's 2007 annual press conference:

> [I]f Protocol 14 does not enter into force soon, the future of the Court and Convention system will be in jeopardy.
>
> . . . [T]he application of Protocol 14 will enable the Court to increase its productivity by at least 25%. Although it cannot suffice by itself, the Protocol is therefore indispensable. Everything starts with Protocol 14. . . .
>
> . . . [Without it,] our great European institution will be asphyxiated.[127]

Given the analogous challenges (though vastly different in scale) facing regional human rights courts and these courts' recent focus on processing cases more efficiently, we hope that our evaluation of several aspects of the inter-American system will complement thinking about other systems as well, while recognizing, of course, that the numerical and other differences between the systems highlight the need for region-specific analyses and solutions.[128]

[124] ECHR ANNUAL REPORT, *supra* note 1, at 146.

[125] *Id.* at 134.

[126] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, Europ. TS. No. 194, *available at* <http://conventions.coe.int/>.

[127] Jean-Paul Costa: Urgent Need to Implement Reforms to Secure Future of European Court, Eur. Ct. H.R. Press Release 063 (2007) (Jan. 25, 2007), *available at* <http://www.coe.int/>.

[128] For instance, in the absence of a European Commission to act as a filter, the ECHR admits only a small minority of its applications, in sharp contrast to the Inter-American Court. Other differences worth analyzing include the phenomenon of so-called clone cases in the European system (groups of cases raising the same questions of law in the same countries), as well as the subject matter of these cases (including the large percentage of European cases that continue to involve procedural violations related to the length of judicial proceedings). *See, e.g.,* ECHR ANNUAL REPORT, *supra* note 1, at 142–45.

Increasing Case Resolution by Decreasing Hearings and Witnesses

A clear trend in the Inter-American Court's work over the past decade—although it has not yet provoked empirical analysis of its effects—has been a reduction in the number of days dedicated to public hearings for each case decided. Accompanying this decline has been a reduction in the use of live witness testimony[129] and an increasing reliance on written affidavits instead, a trend most apparent in the past three to five years. To place these changes into context, it is helpful to contrast the Court's current practice with its initial approach to hearings and testimony, as exemplified by its first contentious case, *Velásquez Rodríguez v. Honduras*.[130]

Historical use of public hearings and witness testimony by the Court. Twenty years ago in *Velásquez Rodríguez* and its companion cases (*Godínez Cruz* and *Fairén Garbi v. Honduras*, all concerning forced disappearances), the Inter-American Court placed visible emphasis on gathering facts in live Court sessions. In the merits phase alone of this line of cases, the Court spent more than a week hearing testimony,[131] and it convened separate hearings to examine admissibility and reparations. When the Court determined that the testimony of members of the Honduran security forces would be useful during the merits stage, it took the initiative of requesting such witnesses.[132] It heard twenty-two witnesses in all.[133]

The significant role that witness testimony played in these cases is evident in the judgments. Witness names appear more than 120 times in the concise *Velásquez Rodríguez* merits opinion, and the Court explicitly stated that certain testimony was instrumental in demonstrating the pattern of disappearances in Honduras at the relevant time. On the basis of its finding that the victim's kidnapping fit the pattern, the Court held Honduras responsible for violations of the victim's rights to liberty, physical integrity, and life.[134]

The numerous witness accounts probably also increased the nascent Court's perceived legitimacy in declaring a violation of the right to life based on a pattern of similar violations, reasoning that might have drawn skepticism if it had not been perceived as well-grounded in the evidence. Finally, the multiple hearings and compelling testimony that characterized the case offered repeated focal points for media attention.[135] The witnesses had the opportunity to publicize the state's forced disappearances in a neutral, highly visible supranational forum, reinforcing domestic actors' own calls for accountability.

[129] We recognize that the testimony of witnesses and that of expert witnesses can play different roles in Court proceedings. For the purposes of this piece, however, which represents an initial exploration of this material, we group together witnesses and experts as one category in our statistical analyses, using the term "witnesses" to refer to this combined group.

[130] Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

[131] *Id.* at 5–6, para. 28.

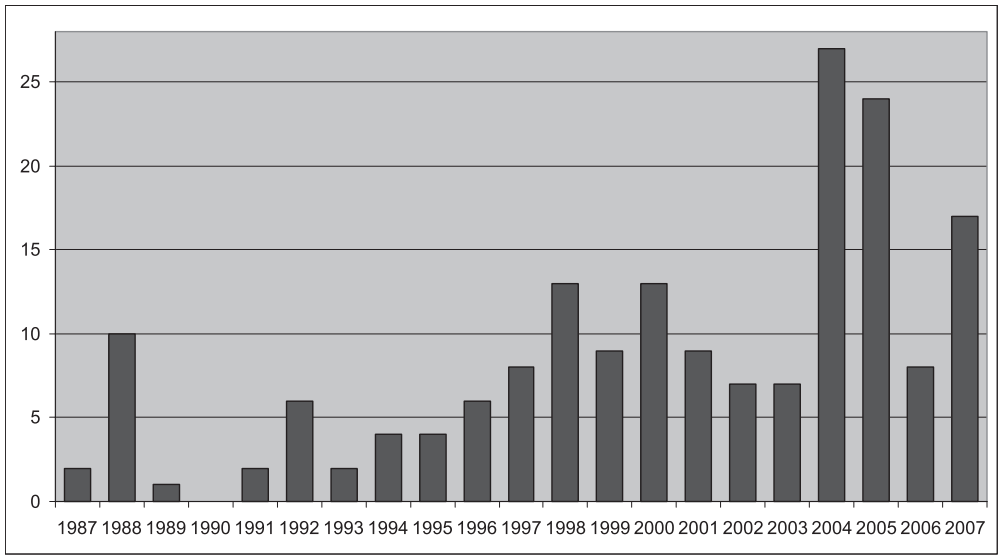
[132] *Id.* at 7, para. 34.

[133] Rather than speaking of twenty-two witnesses, one can view this figure as an average of just over seven witnesses per case in *Velásquez Rodríguez, Godínez Cruz,* and *Fairén Garbi,* respectively. However, since the testimony in these matters occurred largely simultaneously, we find it logical to discuss the cases as one proceeding for the purposes of illustrating the role of live testimony.

[134] *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, sec. XIV, at 34–35 (July 29, 1988). Empirically it is not possible to test whether the Court could have found the necessary facts to reach these conclusions through affidavits rather than testimony. However, the fact that after hearing the offered witnesses, the Court went to great lengths to receive more live testimony suggests that it may have recognized some fact-finding value in testimony (which, among other things, allows for in-person assessments of credibility) as compared to written evidence.

[135] *See* Juan E. Méndez & José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507, 557–58 (1990) (noting the wide press coverage of the hearings).

FIGURE 2. TOTAL DAYS OF PUBLIC HEARINGS ANNUALLY 1987–2007



This chart shows the total number of days in each year that were devoted to public hearings in contentious cases, regardless of the year in which the corresponding cases were decided. For the data, see Inter-Am. Ct. H.R., *Annual Report 2007*, p. 65.

The level of witness testimony seen in *Velásquez Rodríguez* will not be necessary in all or even most cases. However, while the Honduran disappearance cases represent some of the most resource-intensive matters undertaken by the Court (as well as constituting the entire docket at the time), they are by no means unique among cases heard in its first dozen years. For example, in the 1995 case of *Neira Alegría v. Peru*, concerning a prison massacre, the Court heard thirteen witnesses during the merits phase, dividing a week's worth of hearings among preliminary objections, merits, and reparations.[136] In the subsequent cases of *Villagrán Morales v. Guatemala* (concerning the murder of street children by police) and *Baena Ricardo v. Panama* (concerning the dismissal of protesting workers),[137] the Court heard seventeen and fifteen witnesses, respectively. As late as 2003, the Court heard thirteen witnesses in the case of murdered anthropologist Myrna Mack Chang.[138]

In the cases mentioned above, the Court found it necessary to receive more live argument and testimony than the norm. The average numbers during the 1990s are closer to three days of public hearings and seven witnesses per case (see figures 3 and 4, pp. 799, 800).[139] Indeed, a few cases were resolved with only one day of hearings, and in several cases in which the respondent states acknowledged the truth of the facts alleged against them, the Court did not receive

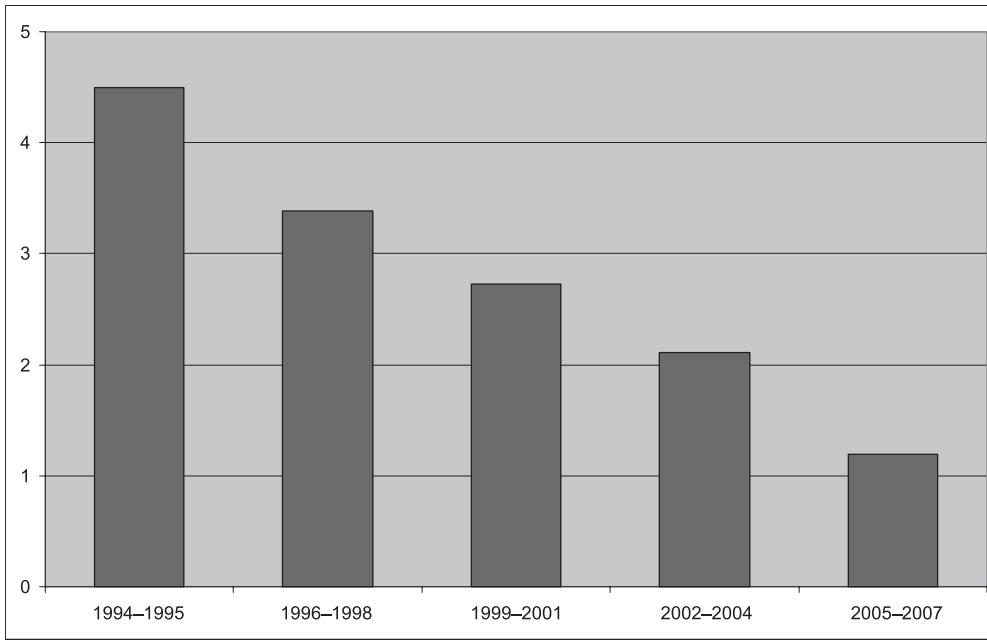
[136] Neira Alegría v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 20 (Jan. 19, 1995).

[137] Villagrán Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999); Baena Ricardo v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2001).

[138] Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003).

[139] The numbers of hearing days and witnesses reported in this article come from our manual count of these data in each judgment issued by the Court. For purposes of our analysis, we count a case as decided in the year in which the merits judgment was issued, although the relevant hearings may be spread out over a period of several years before and after this year. In addition, we have excluded cases that, owing to dismissal or discontinuance, did not reach either the merits or the reparations stage of the case.

FIGURE 3. AVERAGE DAYS OF PUBLIC HEARINGS PER CASE RESOLVED 1994–2007



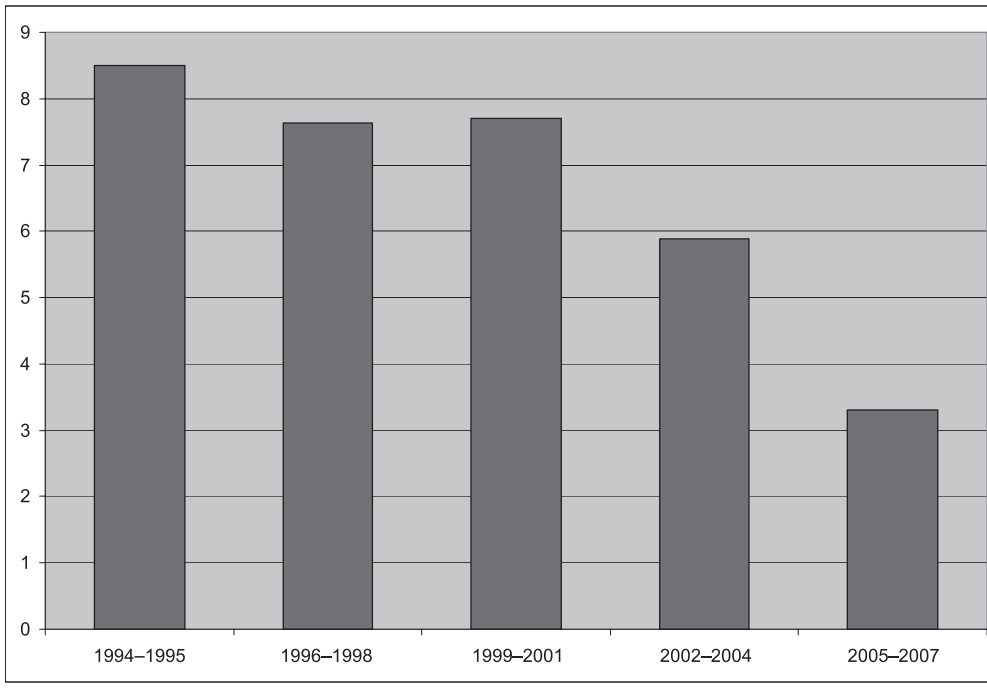
These data were calculated by counting the number of days of public hearings as reported in the Court's judgments, excluding days spent on provisional-measures hearings. The days used for hearings were counted in the year in which the corresponding merits judgments were issued. The chart therefore shows the trend in days spent on each case. Two cases that did not reach either the merits or reparations stages, *Maqueda v. Argentina* (1995) and *Martín del Campo Dodd v. Mexico* (2004), were excluded because they were dismissed or discontinued.

witness testimony.[140] Nevertheless, the important points to underscore here are that until the year 2005, every case considered on the merits received at least one and usually more than one public hearing, and those hearings often spanned multiple separate procedural stages (particularly through 2002). Likewise, it was the strong norm, if not the universal rule, for each case to feature witnesses, who might testify at the preliminary objections, merits, or reparations stage. In fact, prior to 2005, every contested case considered on the merits (that is, every case in which the state did not acknowledge responsibility for the alleged violations) included witness testimony. As shown above, the Court did not hesitate to exercise the option to convene large numbers of hearings and witnesses in a single case.

Reduction in hearings and witnesses following the procedural reforms. In contrast to the practice described above, the last several years have seen a clear trend toward reducing the number of witnesses and hearings dedicated to each Court case. The explanation for this reduction lies primarily in the Commission's 2001 procedural reforms, which more than doubled the cases progressing to the Court. Faced with a growing caseload, the Court responded by seeking to minimize the amount of time spent on individual cases, consistently limiting to one or two the total number of public hearing days devoted to each.

[140] As the above data illustrate, the number of hearing days and especially of witnesses has traditionally varied from case to case, sometimes greatly. We do not assert that the Court ever heard a certain uniform number of witnesses in each case, nor do we maintain that it should establish any such number. Rather, we favor a model in which it retains the flexibility to receive as many witnesses as needed for each case, meaning that variance from case to case is to be expected.

FIGURE 4. AVERAGE NUMBER OF WITNESSES PER CASE RESOLVED 1994–2007



These data were calculated by counting the number of witnesses as reported in the Court's judgments. The witnesses were counted in the year in which the corresponding merits judgments were issued. The chart therefore shows the trend in witnesses heard in each case. *Las Palmeras v. Colombia* (2001) was excluded because the merits opinion does not list the witnesses who appeared, and *Maqueda v. Argentina* (1995) and *Martín del Campo Dodd v. Mexico* (2004) were excluded because, not having reached either the merits or reparations stages, they were dismissed or discontinued.

By the time the full effects of the Commission's reforms reached the Court (roughly in 2003), the judges viewed their resource constraints in dire terms, prompting their previously quoted warning of "the imminent collapse that will occur beginning in the year 2004 in the work of the Inter-American Court."[141] In this climate, the Court passed its own reforms in 2003, including an overhaul of its provisions for hearing witness testimony. The Rules of Procedure now provide in Article 47(3): "The Court may require, for reasons of procedural economy, that particular witnesses and expert witnesses offered by the parties give their testimony through sworn declarations or affidavits."[142] Since the introduction of this provision, the Court's judgments have routinely contained a paragraph setting forth the sometimes-lengthy list of proposed witnesses who submit affidavits under Article 47(3).

As demonstrated in the graphs above (figures 2–4), the Court's changes in procedure have allowed it to triple its case output in recent years, meeting the challenge of the 2001 procedural reforms. In addition, in 2004 and 2005 the Court devoted a much greater total number of days to public hearings than in previous years. Viewed on a case-by-case basis, however, the reductions in the use of live hearings and witnesses are striking. Among cases resolved from 2005 to the present, the average number of hearings and witnesses has fallen to just above one day of

[141] *See* note 51 *supra* and corresponding text.

[142] Inter-Am. Ct. H.R., Rules of Procedure, *supra* note 46, Art. 47(3).

hearings[143] and three live witnesses per case. Recalling that there are now three parties litigating (petitioners, Commission, state), the latter total yields an average of just over one witness per party per case. These trends are also apparent when the data are broken down by cases rather than by years.[144]

Contributing to the pattern seen above, the Court's routine practice is now to combine all phases of a matter (preliminary objections, merits, and reparations) into one hearing or consecutive set of hearings, reducing not only the amount of time spent on each phase, but also the ability of witnesses to testify to the sometimes distinct factual matters involved. Nowadays, when the Court holds a hearing, the petitioners and the Commission have approximately twenty-five minutes each to present their final arguments, addressing in this time all phases of the case.[145] Similarly, each party in practice has a mere fifteen minutes to examine each witness, although witnesses may be asked to testify about matters relating to multiple phases.[146]

Evaluation of the Court's Streamlined Procedures

We cannot state conclusively that the Court's reduction in hearings and witnesses has been, in general, a change for the worse. The on-the-ground effects of the dramatic increase in cases processed since 2004 have rarely yielded proof that the streamlined procedures have either amplified or reduced the Court's impact. It may be that more time must pass before any effects become apparent, or it may be that because some states are already so reluctant to implement certain types of reparations orders, the lack of implementation in any given case is difficult to attribute to changes in Court procedures.

Nonetheless, at least two reasons at this stage warrant critically examining the Court's procedural changes. First, as a matter of principle, when a supranational human rights tribunal undergoes any dramatic alteration, scholars and practitioners should consider the possible negative (and positive) effects that may result.[147] Particularly as the African Court prepares to begin operating, the Inter-American Court may serve as a model of the consequences of following certain procedures.

Second and more specifically, we find several troubling signs that the pressure on the Inter-American Court to increase its rate of case processing may be weakening the relevance, in some cases, of its work for domestic forces. We raise these issues below, drawing on concrete examples to illustrate why we consider the Court's new procedures cause for concern.

[143] Note that we count all public hearings in these calculations, regardless of whether these hearings involved witness testimony.

[144] In addition, although the growing percentage of cases resolved through a state's recognition of responsibility for alleged violations (discussed *infra*) contributes to this trend, the same general pattern is apparent even when only contested cases are considered.

[145] Interview with Juan Pablo Albán, litigation officer, Inter-American Commission, Washington, D.C. (Feb. 21, 2007); Interview with Lilly Ching, litigation officer, Inter-American Commission, Washington, D.C. (Feb. 21, 2007).

[146] Interviews with Albán and Ching, *supra* note 145.

[147] Indeed, the judges of the Inter-American Court indicate that the Court's process of reform is an ongoing effort requiring constant evaluation. In this sense, they invite commentary to aid them to "incorporate well-founded reforms, anchored in experience, necessity, and possibility." INTER-AM. CT. H.R., SÍNTESIS DEL INFORME ANUAL DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS CORRESPONDIENTE AL EJERCICIO DE 2006, at 17 (Mar. 29, 2007), *available at* <http://www.corteidh.or.cr/discursos.cfm>. We hope that the ideas set forth in this article contribute to the Court's ongoing evaluations as envisioned in this quotation.

An increased number of judgments brings decreased space for advocacy. As mentioned above, a victory in the Inter-American Court will normally have a broader social impact to the extent that it contributes to advocacy on an issue. In this regard, the Court's current restrictions on public hearings, and especially its failure to hold hearings at all in some cases, threaten to deprive civil society of opportunities to concentrate media and public attention on underlying human rights campaigns,[148] in both contested cases and cases in which states acknowledge some or all of the alleged violations. Past cases demonstrate the specific value of public hearings (as opposed to written proceedings) in bringing attention and pressure to bear on human rights issues. For example, in the provisional measures case of *Urso Branco v. Brazil*, concerning a massacre and subsequent acts of violence in a penal facility, the Court granted provisional measures in favor of the inmates in June 2002.[149] Yet it was not until the Court convened a public hearing in 2004[150] that the inter-American case gave rise to significant media attention in Brazil, following which the media used the hearing to generate pressure regarding the government's failure to respond to violence in Urso Branco prison.[151] Also illustrative is the hearing in *Montero Aranguren v. Venezuela* (the *Retén de Catia* case),[152] which was attended by Venezuelan journalists. The hearing gave rise to news stories not only about the Court case and its underlying facts, but also about the entire history of the matter before the inter-American system, including the state's prolonged failure to comply with the terms of its prior friendly settlement before the Commission.[153]

Public hearings attract attention not only domestically but also internationally. Professor Jo M. Pasqualucci, who has undertaken extensive studies of the Inter-American Court, affirms that its hearings have helped to stimulate international publicity on cases and hence to increase pressure on respondent governments.[154] Notably, states may take positive human rights measures, such as modifying their practices or releasing an imprisoned victim, precisely at or around the time of a public hearing.[155]

[148] Former Inter-American Court judge Thomas Buergenthal comments on the challenge of generating media attention for a case and the negative consequences of failing to do so, stating:

> Judges and court employees are prevented from making any but the blandest pronouncements about the cases being heard . . . . Those statements they feel free to make certainly do not attract the public attention that human rights courts need in order to have an impact . . . . Judgments of international human rights courts that are not adequately publicized are much easier for governments to disregard.

Buergenthal, *supra* note 26, at 279. These observations reinforce the value of public hearings, in which the media have firsthand access to the parties, witness testimony, and the arguments at issue in a far more compelling form than would otherwise occur.

[149] Urso Branco v. Brazil, Provisional Measures Order (Inter-Am. Ct. H.R. June 18, 2002).

[150] *See* Urso Branco v. Brazil, Provisional Measures Order, para. 22 (Inter-Am. Ct. H.R. Apr. 22, 2004).

[151] *See, e.g., Crise na prisão Urso Branco leva Brasil a se explicar na OEA,* O ESTADO DE S. PAULO, May 20, 2004, *available at* <http://www.estadao.com.br/arquivo/cidades/2004/not20040520p13325.htm>.

[152] Montero Aranguren v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

[153] *See, e.g.,* Solbella Pérez Rodríguez, *Juzgarán masacre del Retén de Catia*, EL UNIVERSAL.COM, Apr. 3, 2006, <http://buscador.eluniversal.com/2006/04/03/pol_art_03156A2.shtml>.

[154] PASQUALUCCI, *supra* note 48, at 195.

[155] One example of such timing is *De la Cruz Flores v. Peru*, in which the detained victim was released within days of the public hearing. *See* De la Cruz Flores v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 115, at 5–6, 40, paras. 28, 73(48) (Nov. 18, 2004); *see also* Ximenes Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006) (in which Brazil took concrete steps to improve conditions in several mental health centers shortly before the public hearing in the case).

Thus, to human rights activists, hearings may constitute a tool for generating both domestic and international human rights pressure on governments.[156] That the Court has reduced its use of hearings as its caseload has grown does not reflect the salutary trimming away of superfluous procedures but, rather, should be recognized as a trade-off in which potential domestic advocacy value in some cases is reduced. This situation serves as a clear call, if not for the Court to retreat in its efforts to streamline its procedures, then for the OAS to provide the increased funding that the Court needs to process its current docket while still guaranteeing that sufficient time is available for public hearings in individual cases.

Effects of the procedural reforms on the Court's fact-finding. The Court's decreased use of hearings and witnesses raises serious questions about the extent to which live testimony is necessary to establish a full and accurate record of events. While we do not argue that witness testimony is indispensable in every case, our survey of inter-American litigation indicates that the role of live witnesses in fact-finding cannot always be fulfilled by written submissions. Before scrutinizing this issue in the inter-American context, it may be useful to set forth several observations on the experience with live testimony in the only other regional human rights tribunal currently in operation, the European Court.

Even in the European system, which in recent years has issued over fifteen hundred merits judgments annually,[157] and in which oral hearings are necessarily the exception rather than the rule, there are signs that the ECHR is conscious of the importance of witness testimony in certain cases of large-scale and systematic violations. Since the entry into the Council of Europe of various new member states in which the rule of law is still solidifying or in which the government faces ongoing armed conflict, the fact patterns before the ECHR have included a larger number of forced disappearances and other violations resembling those traditionally seen in Latin America.[158] The ECHR's recognition that these complex and violent fact patterns sometimes require a more intensive fact-finding process is reflected in the presence in the very small percentage of cases in which it takes live evidence from witnesses (usually by sending delegations of judges to hear witnesses in-country[159]) of allegations that generally involve a context of systematic violations or difficult-to-ascertain facts in states facing challenges in entrenching respect for human rights.[160] From 2002 to 2006, the ECHR deployed fact-finding missions to countries including Croatia, Cyprus, Finland (to interview a refugee claimant contesting deportation to the Democratic Republic of the Congo), Georgia, Greece, Moldova, and Ukraine.[161] It also sent several delegations to Turkey: in the forced disappearance case of

[156] Notably, in recent months the Court has initiated the practice of holding private hearings to receive information regarding compliance. All compliance reports are available at the Court's Web site, *supra* note 4.

[157] ECHR ANNUAL REPORT, *supra* note 1, at 137.

[158] *See* Cerna, *supra* note 25. Many cases of severe violations also arise out of facts occurring in Turkey.

[159] Interviewing witnesses in-country, of course, is not identical to having those witnesses testify in court. However, fact-finding missions are more akin to live testimony than to affidavits, as during fact-finding missions the judges may formulate questions (rather than simply the party offering the witness). Live interviews also allow judges to pursue new lines of inquiry that emerge and to evaluate witnesses' demeanor. (These advantages of live testimony will be discussed further *infra*.)

[160] Common contexts for fact-finding missions include cases regarding prison conditions and cases arising from political conflicts such as the dispute over Cyprus, the conflict between the PKK political party and the Turkish government, and the Russian-Chechen conflict. *See* note 161 *infra* for citations.

[161] Benzan v. Croatia, App. No. 62912/00 (Eur. Ct. H.R. 2002); Adali v. Turkey, App. No. 38187/97 (Eur. Ct. H.R. 2005); N. v. Finland, App. No. 38885/02 (Eur. Ct. H.R. 2005); Shamayev v. Georgia and Russia, 2005–III Eur. Ct. H.R.; Kaja v. Greece, App. No. 32927/03 (Eur. Ct. H.R. 2006); Ilaşcu v. Moldova and Russia, App. No.

İpek v. Turkey, three judges heard eight witnesses over several days in November 2002;[162] in *Taniş v. Turkey*, involving the disappearance of two other individuals, three judges took evidence from thirty-two witnesses in April 2003;[163] and in *Balyemez v. Turkey*, concerning detainees suffering the effects of a prolonged hunger strike (the subject of some fifty similar applications to the ECHR), a delegation from the Court and a committee of medical experts visited various detention facilities, interviewed staff, and examined alleged victims in September 2004.[164]

During the fact-finding missions listed above, the ECHR delegations took evidence from more than 130 witnesses, sometimes hearing dozens in a single case. Thus, in *Ilaşcu v. Moldova and Russia*, four judges took evidence from a total of forty-three witnesses over six days.[165] The case concerned the conviction, alleged torture, and conditions of detention of four persons.[166] After interviewing witnesses in locations including a Moldovan prison and the headquarters of a Russian military detachment, the ECHR ultimately held both Moldova and Russia liable for arbitrary detention and torture.[167]

The use of fact-finding missions remains confined to a minority of cases,[168] as the ECHR often adopts other methods to address factually disputed, complex violations. In some cases, for instance, it applies presumptions to shift the burden of proof when core facts in dispute have not been established by the state, finding that the petitioners' version of the facts is true because the state failed to convince the Court of an alternative version.[169] However, the fact-finding pattern discussed above does demonstrate recognition by the ECHR that despite its enormous caseload, it must approach its docket with flexibility and deploy vastly greater fact-finding resources than normal in certain circumstances. With the ECHR's experience in mind, we turn once more to fact-finding in the Inter-American Court.

At a conference on the inter-American system held in March 2007, the Court's deputy secretary, Emilia Segares Rodríguez, argued forcefully that the Court's reduction in oral testimony

48787/99 (Eur. Ct. H.R. 2004); Naumenko v. Ukraine, App. No. 42023/98 (Eur. Ct. H.R. 2004). Note that the respondent state does not always correspond to the location of the on-site fact-finding.

[162] İpek v. Turkey, 2004–II Eur. Ct. H.R., para. 8 (extracts), *available in full at* the Court's Web site, *supra* note 1. It is noteworthy that when one witness failed to appear and instead sent a sworn affidavit, the Court pointed out that his statement could not be weighed as heavily as live testimony since it was not subject to cross-examination. *Id.,* paras. 119–20.

[163] Taniş v. Turkey, 2005–VIII Eur. Ct. H.R., paras. 23–137.

[164] Balyemez v. Turkey, App. No. 32495/03, paras. 59–64 (Eur. Ct. H.R. 2005). The fact-finding missions listed here appear in the ECHR's Annual Section Activity Reports, Annual Grand Chamber Activity Reports, and/or archived press releases that mention the term "fact-finding" for the years 2002–2006.

[165] *Ilaşcu,* App. No. 48787/99, paras. 12–13.

[166] *Id.,* para. 3.

[167] *Id.,* op. paras. 9, 10, 14, 15.

[168] We do not assert that the ECHR's current, limited use of witness testimony is ideal or that there is no room for improvement in its fact-finding procedures despite its large caseload. We note, for instance, that Françoise Hampson, a leading practitioner before the European Court, has proposed that the ECHR create another chamber that would focus exclusively on fact-finding hearings. *See* Philip Leach, *Human Rights Hotspots and the European Court*, N.L.J., Feb. 6, 2004, *available at* <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/> (follow "media and journals" hyperlink; then follow "European Court of Human Rights" hyperlink).

[169] *See, e.g.,* Bitiyeva v. Russia, App. Nos. 57953/00, 37392/03, paras. 132–35 (Eur. Ct. H.R. 2007) (finding the state liable for extrajudicial executions in Chechnya under a shifted burden of proof since it did not sufficiently rebut the applicants' prima facie case or produce necessary documents); Bazorkina v. Russia, App. No. 69481/01, paras. 104–05 (Eur. Ct. H.R. 2006) (reiterating the ECHR's jurisprudence concerning the shifted burden of proof applicable in cases of individuals injured while in police custody).

in favor of written submissions need not compromise the quality of its work, stating that although the Court had changed its operational procedures, "this does not signify . . . that there will be a change in the quality of its judgments."[170] On the basis of our analysis of the current evidentiary procedures of the Court and interviews with practitioners before it, there is at least reason to question whether the picture is so promising. Indeed, there is reason to believe that an exchange of affidavits may not be comparable to the presentation of live witness testimony.

While witness testimony has historically played a different role in civil versus common law traditions, legal systems the world over recognize the basic value of live witness evidence—whether before a judge or a jury—in discerning the truth.[171] Live witnesses may be questioned and may more easily be found unreliable than documentary evidence, which can affect the facts proven and legal conclusions reached by a court.[172]

Our interviews of practitioners in the inter-American system and our studies of and participation in Court proceedings lead us to conclude that the experience of the Inter-American Court supports the value of live witness testimony. For instance, if a live witness gives testimony that provokes a new line of inquiry, the other parties can respond by pursuing this line of questioning or challenging the new argument, leading to a better clarification of the facts. Attorneys at the Inter-American Commission have commented on the importance of public hearings in affording them the chance to cross-examine the state's witnesses.[173] They relate multiple instances in which such cross-examination has brought out lines of questioning that have ultimately had a positive impact on the case.[174]

The use of written affidavits precludes these opportunities. As attorneys at the Commission point out, when a state offers witness testimony through an affidavit, the state's authorities usually decide which subjects the witness will address. In these circumstances, the state will probably not ask the questions that the other parties would like to pose (a deficiency that is not cured by the fact that each party can submit comments on the other parties' affidavits). In addition, one of the purposes of testimony is to enable judges to ask questions about matters that are

[170] Webcast: Emilia Segares Rodríguez, Remarks, *in* Washington College of Law, American University, Second Annual Meeting on Human Rights, Overview of the Current Status of the Inter-American Human Rights System's Case Law (Mar. 9, 2007) [hereinafter Overview], *available at* <http://www.wcl.american.edu/humright/hracademy/2008/meeting_webcast.cfm#>.

[171] While providing less opportunity than common law systems to question a witness directly or via cross-examination, civil law procedure still places value on the statements of live witnesses. *See, e.g.*, Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 266 n.63 (1977).

[172] In her detailed discussion of the value of live versus written testimony in the context of international criminal tribunals, former ICTY Judge Patricia M. Wald makes this observation, based on the experience of the ICTY: "Cross-examination, considered alongside lifeless affidavits, counsels a prudent skepticism of written testimony." Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 229 (2002).

[173] Interview with Albán, *supra* note 145; Interview with Ariel Dulitzky, then human rights senior specialist, Inter-American Commission, Washington, D.C. (Feb. 21, 2007).

[174] *E.g.,* Interview with Dulitzky, *supra* note 173 (noting that examining a state witness in *Yean and Bosico v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), gave rise to a line of questioning by judges concerning the criteria used to issue birth certificates and noting that in *Serrano Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005), cross-examination elicited information concerning the military's failure to keep records of what happened to children taken by the armed forces).

unclear to them. This process becomes much more difficult if the witnesses are not present and the parties do not realize beforehand which subjects will need clarification.

The party offering witnesses may prefer live testimony because it is more compelling and more easily understood. In cases with complex fact patterns, it may be crucial to present witnesses who can explain detailed sequences of events or experts who can clarify opaque domestic procedures. Further, certain features of witness testimony, such as credible demeanor, may be accessible only through live hearings. In *Velásquez Rodríguez*, for example, counsel for the petitioners emphasized the demeanor of three witnesses associated with the Honduran security forces. The attorneys noted, "Although there were no important revelations, their wooden explanations and demeanor raised serious doubts about their credibility. Consequently, their appearance strengthened the Commission's case."[175] The Court also based part of its reasoning on demeanor in *Aloeboetoe v. Suriname*, discounting a certain witness's testimony because of "the manner in which that witness testified, his attitude during the hearing and the personality he revealed."[176]

That litigants believe that live argument and testimony are superior to written submissions alone is evidenced by the fact that parties often ask the Court to convene public hearings and may protest if it declares that no hearing is necessary. For example, in *Fermín Ramírez v. Guatemala*, a 2005 death penalty case, the petitioners argued that a hearing was necessary to resolve the case fairly, "taking into consideration the importance of presenting their arguments *in voce* and being able to directly refute the State's positions."[177] In denying the petitioners' request, the Court cited the need for procedural economy in light of its large caseload.[178]

The curtailment of oral proceedings may also lead to the negative consequence of undetected violations. We acknowledge that the number of hearings and witnesses appropriate to any given case will vary based on the complexity of the facts; thus, there is no baseline requirement for every case. Nevertheless, the Court's current standard procedure of restricting every case to one or two days of sessions and roughly one or two witnesses per party strongly suggests that it seeks to observe these limits as a blanket time-saving measure, a policy that may leave inadequate room for consideration of the factual complexity of each individual case. In 2006 one member of the Court made clear his opinion that its efforts to increase the rate of case resolution had led to "decisions that are inevitably rushed."[179] It bears emphasizing that the negative impact of even one case in which insufficient factual evaluation by the Court leads to a failure to find violations is potentially devastating.

The potential for the curtailment of oral proceedings to have a negative impact on the Court's fact-finding, moreover, may increase in the coming years, as the Latin American region increasingly shifts to democratic governance. The now-democratic governments of Latin

[175] Méndez & Vivanco, *supra* note 135, at 540.

[176] Aloeboetoe v. Suriname, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, at 14–15, para. 58 (Sept. 10, 1993).

[177] Fermín Ramírez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 126, at 5, para. 23 (June 20, 2005).

[178] Fermín Ramírez v. Guatemala, Resolution of the Court, *Considerando,* para. 19 (Inter-Am. Ct. H.R. Apr. 28, 2005) (on file with authors).

[179] Servellón García v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 152, para. 3 (Sept. 21, 2006) (Cançado Trindade, J., sep. op.).

America are less likely than their predecessors to engage in blatant, targeted human rights violations (such as mass forced disappearances) and then fail to take *any* steps in response to denunciations of these violations. In a far more likely scenario, domestic authorities, recognizing that it is in their interest to maintain the appearance of the rule of law, will engage in the outward motions or initial stages of investigating violations before either closing the investigation or allowing it to languish with little hope of resolution. When such a case reaches the Inter-American Court, it may require thorough contextual knowledge of the normal procedures followed by domestic authorities to determine whether the state's investigation was performed in good faith. Indeed, the Court already processes a large number of this type of case, in which witness and expert testimony may be essential to an accurate appreciation of the facts.[180]

These arguments find strong support in *Nogueira de Carvalho v. Brazil* of 2006,[181] a factually complex case concerning impunity for a killing within the broader context of death squad murders. The case arose from the murder of human rights defender Gilson Nogueira in the Brazilian state of Rio Grande do Norte. Because Nogueira's murder took place prior to Brazil's recognition of the competence of the Inter-American Court, the Court could base its ruling only on the failure (if demonstrated) of Brazilian authorities to investigate this death in accordance with the judicial guarantees of the inter-American system.[182] Over several years, Brazilian authorities had cloaked their bad-faith actions in this regard in the guise of legality, going through the outward motions of investigation and compiling thousands of pages of court documents in the process. Only by analyzing sufficient evidence to gain a solid understanding of Brazilian police and judicial procedures would it have been possible for the Court to appreciate the full extent of the violations in the case.

Following its recent standard practice, the Court devoted a single day to hearings, combining its evaluation of admissibility and the merits of the case into one process. The Court heard testimony from a total of only three witnesses, two on behalf of Brazil and one on behalf of the Commission (the Court rejected all of the petitioners' witnesses). The parties, by contrast, had proposed more than a dozen witnesses,[183] including individuals who could testify to specific acts by Brazilian authorities that demonstrated deviations from normal police procedure and other failures to comply with the requirements of the American Convention.

After its single day of hearings, the Court issued a judgment in which it failed to find any violations, stating only that the petitioners and the Commission had not produced sufficient evidence to establish that Brazil had failed to investigate Gilson Nogueira's murder in good

[180] A positive example is the 1999 case of *Villagrán Morales v. Guatemala*, involving the extrajudicial execution of street children, in which one of the expert witnesses testified entirely on the defects of domestic investigations and judicial proceedings. After highlighting various failures of the investigating authorities, this expert cited precedents within Guatemalan law to show how a domestic judge's procedure had been irregular and demonstrated partiality. Villagrán Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, at 20–22, para. 66(b) (Nov. 19, 1999). This expert's presentation of the narrative of the case probably facilitated the judges' understanding of the degree to which the domestic procedures had been deficient; the Court subsequently set forth a detailed condemnation of the flawed investigation and domestic judicial proceedings. *Id.* at 53–55, paras. 228–38.

[181] Nogueira de Carvalho v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 161 (Nov. 28, 2006).

[182] The Commission maintained that the deficiencies in the state investigation violated Articles 8 and 25 of the Convention, *Nogueira de Carvalho v. Brasil*, No. 12.058, Demanda at 23 (Inter-Am. Comm'n H.R. Jan. 13, 2005), while the petitioners additionally argued that these actions violated Article 4 by failing to protect and guarantee the right to life. Justiça Global, *Alegações Finais,* Gilson Nogueira de Carvalho v. Brasil, paras. 67–109, Mar. 10, 2006; *see also* 2006 IACHR ANNUAL REPORT, ch. III, para. 524.

[183] *See* Justiça Global, *supra* note 182, para. 2 n.2; Nogueira de Carvalho v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 161, at 6, para. 23 (Nov. 28, 2006).

faith. This ruling runs counter to the analysis of multiple Brazilian public bodies and civil society groups,[184] as well as international human rights organizations,[185] which concurred in signaling that state agents were responsible for Nogueira's death and that the subsequent investigation was not seriously pursued with the intention to clarify the facts or punish those responsible.

It would be difficult to overstate the devastating effects of this pronouncement on the human rights advocates in Rio Grande do Norte, who awaited a positive ruling by the Court to provide support for their struggle against ongoing violence and impunity in the region. Instead of serving as a tool to advance local human rights campaigns, the Court judgment played into the hands of the very state government implicated in Nogueira's murder; one of Brazil's representatives before the Court was subsequently able to portray the judgment in the state media as "an important decision . . . recognizing [the state's] non-violation of human rights."[186] The same representative added, "The judgment serves as an example to the Commission. Before getting carried away and bringing any old case to the Court, they ought to think first."[187]

Recognizing once again that the Inter-American Court faces compelling trade-offs when deciding how to allocate its resources, we hesitate to suggest that it further restrict the already limited access of victims by taking measures that might lead to reductions in the number of cases it hears. In light of the above, however, the apparently substantial gains involved in hearing larger numbers of cases may prove illusory if in some complex cases crucial facts will be missed, leading to suspect conclusions of fact and negative consequences for the protection of human rights on the ground.

Playing the System: State Acknowledgments of Responsibility

Another striking trend in inter-American litigation over the past few years has been the growing number of acknowledgments of responsibility by states for the human rights violations alleged against them. An acknowledgment of responsibility (or *allanamiento* in Spanish) can be made before or during the merits stage of the case (with some occurring during public hearings convened for adversarial consideration of the merits). To effect an *allanamiento*, the

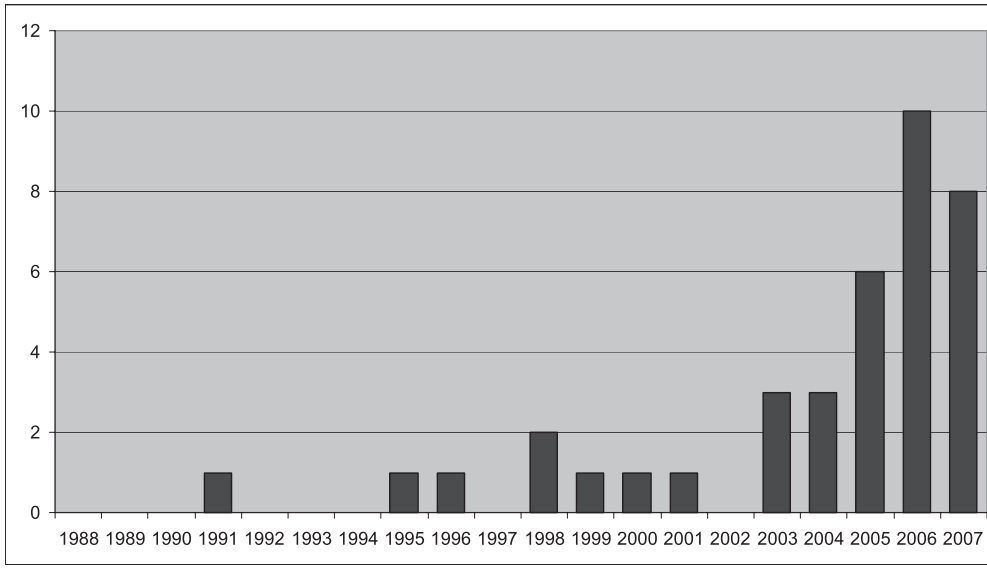
[184] Brazilian bodies condemning the role of the state agents in Nogueira's murder and/or the deficiency of the investigation include a special commission of the state office of the public prosecutor, the human rights commission of the National Bar Association, the human rights commission of the national legislature, and the Federal Commission of Rights of the Human Person, a body with a mixed civil society/government composition. Scores of Brazilian civil society groups joined in condemning the state at the time of Nogueira's murder and in criticizing the subsequent investigation performed by Brazilian police and prosecutors. On this latter point, see the October 2006 statement of the Brazilian Forum of Human Rights Organizations (a network of fifty leading Brazilian rights groups) on the tenth anniversary of Nogueira's death. Fórum de Entidades Nacionais de Direitos Humanos, Dez anos do assassinato de Gilson Nogueira (Oct. 19, 2006), *available at* <http://www.direitos.org.br/index.php?option=com_content&task=view&id=2010&Itemid=2>.

[185] *See, e.g.,* Hum. Rts. Watch, *World Report 1998: Brazil*, *available at* <http://www.hrw.org/worldreport/Americas-01.htm> (noting the general lack of investigation into violations against human rights defenders in Rio Grande do Norte and stating that the investigation of Nogueira's death was closed "despite significant evidence of police involvement in his killing"); Amnesty Int'l, Brazil: The Killing of Francisco Gilson Nogueira and Threats Against Witnesses, *in Special Appeals on Behalf of Human Rights Defenders in Latin America* 7, AI Index AMR 01/03/99, June 1, 1999, *available at* <http://archive.amnesty.org/library/pdf/AMR010031999ENGLISH/$File/AMR0100399.pdf>.

[186] *See* Sérgio Vilar, *Estado é absolvido pela Corte Interamericana*, DIÁRIO DE NATAL (Braz.), Dec. 21, 2006, at 6.

[187] *Id.*

FIGURE 5. CASES DECIDED ANNUALLY WITH FULL OR PARTIAL ACKNOWLEDGMENTS OF RESPONSIBILITY 1988–2007



For the purposes of this graph, cases are counted as decided in the year in which the Court issued the corresponding merits judgments. The cases included here are those classified as *allanamientos* by the Court. *See* Inter-Am. Ct. H.R., *Annual Report 2007*, p. 72; Inter-Am. Ct. H.R., *Síntesis del Informe anual de la Corte Interamericana de Derechos Humanos correspondiente al ejercicio de 2007*, p. 8.

state declares that it accepts international responsibility for part or all of the allegations of the Commission or petitioners. The case may then proceed to an adversarial consideration of any allegations still in dispute or it may turn directly to a determination of reparations due.

While *allanamientos* occurred occasionally during the 1990s (prior to the year 2000, six cases included a partial or full *allanamiento*), they remained the exception to the rule; but in the past five years, the number of states adopting this approach has increased steeply (see figure 5). In 2006 alone, ten cases ended with partial or full *allanamientos*, representing almost 60 percent of the cases resolved by the Court. Of the judgments published in 2007, the Court classifies 80 percent as involving some form of *allanamiento*.[188]

The Inter-American Commission and Court, as well as observers and participants in the system, have welcomed *allanamientos* as a sign of positive engagement by states and a visible step forward in solidifying regional respect for international human rights.[189] In certain cases, however, this characterization may reflect a misunderstanding of the process by which Inter-American Court litigation is most likely to advance human rights on the ground. Viewed at the

[188] *See* IACHR SÍNTESIS, *supra* note 58, at 8.

[189] *See, e.g.,* Manuel Ventura Robles, *The Discontinuance and Acceptance of Claims in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. INT'L & COMP. L. 603, 619 (1999) ("The acceptance of a claim . . . has an enormous importance because it represents a serious and responsible attitude by the States demanded before the Court . . . ."); Zambrano Vélez v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 166, at 4, para. 10 (July 4, 2007) (in which the Commission describes the state's acknowledgment as a "positive step toward the vindication of the victims' memory and dignity," as well as toward "efforts aimed at avoiding the repetition of similar situations"); Escué Zapata v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 165, at 6, para. 20 (July 4, 2007) (noting that the state's acknowledgment was a positive contribution to "the proper fulfillment of the Inter-American human rights jurisdictional function and, in general, the enforcement of the principles enshrined by the American Convention").

supranational level, *allanamientos* may certainly allow the Court to process cases more quickly (by declaring violations without the need to evaluate competing factual and legal arguments in an adversarial setting), and of course they facilitate recovery by the victims involved in the case. Yet declaring violations against these individual victims will have little significance for the broader class of similarly situated victims on the ground unless the Court's procedures and judgments are relevant to the needs of domestic human rights movements—needs, we suggest, that may sometimes be frustrated by *allanamientos*.

By recognizing responsibility before the Court, states gain more power in framing the litigation. In particular, states can sometimes avoid a full fact-finding process (including live testimony) that would cast their respect for human rights in a highly damaging light, and they may use public hearings as a forum for proclaiming their commitment to human rights. In our view, this understanding of *allanamientos*—as a state strategy for saving face and gaining greater control over the case, perhaps with a view to defusing domestic pressure concerning an issue—is the relevant understanding with respect to at least some cases in which states acknowledge responsibility.

On the basis of this understanding, we maintain that the Court must not automatically view *allanamientos* as an opportunity to resolve a case with streamlined procedures but, rather, as a warning sign that it should make special efforts to ensure that the procedures and outcome of the case avoid, to the greatest extent possible, manipulation by the state. Indeed, the Court has already made notable progress in this direction.

Cause for concern: allanamientos *following denials.* One clear indication that *allanamientos* do not always represent an increased commitment to human rights is the strategic use of such acknowledgments only after a state's efforts to have a case dismissed (or to win it on the merits) have failed. In *Ximenes Lopes v. Brazil*,[190] for example, the Court had scheduled two days for public hearings and the witnesses had flown to the Court to testify on the merits, only to have Brazil demand a suspension in the live proceedings (ultimately lasting several hours) while the Court made a determination on the state's preliminary objections. Only after losing this stage of the case did Brazil acknowledge partial responsibility for the alleged violations, having meanwhile cost the Court and the parties precious time to advance its own interests.[191] The Court welcomed Brazil's acknowledgment of responsibility as "a positive contribution to the outcome of the instant case and to the effectiveness of the principles which have inspired the American Convention in Brazil."[192] Likewise, the Commission lauded Brazil for its "positive, ethical, responsible, and constructive attitude . . . in acknowledging its liability for the violation of Articles 4 and 5 [of the Convention]."[193] However, the procedure followed by the state—namely, expending the resources of the Commission and Court in contesting the case,[194] only to withdraw part of its arguments when it became apparent that the case would be considered on the merits—indicates neither a strong commitment to human rights accountability nor a desire to conserve the system's resources. Moreover, even after deciding to acknowledge partial

[190] Ximenes Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

[191] *Id.* at 7, paras. 35–36.

[192] *Id.* at 26, para. 80 (footnote omitted).

[193] *Id.* at 23, para. 64.

[194] In its initial submission, the state questioned the cause of the victim's death and also alleged that it had taken all the proper steps to investigate the case. República Federativa do Brasil, Ximenes Lopes v. Brasil, Contestação do Estado Brasileiro, paras. 4, 84, 175 (Mar. 9, 2005).

responsibility for the alleged violations, the state did so in such an indirect and legalistic manner that the victim's sister, who was present in the courtroom, did not understand what had been said and had to ask for an explanation.[195]

States may also attempt to retract *allanamientos* if they perceive a change in strategy to be in their interests. One notable example is *Montero Aranguren v. Venezuela*,[196] which concerned the massacre of thirty-seven detainees at the Retén de Catia (Catia Detention Center). In this case, following its signing of a friendly settlement and an *allanamiento* at a Commission hearing, Venezuela failed to fulfill its part of the settlement.[197] It subsequently rejected the proposition that friendly settlements were legally binding, maintaining that such an understanding would be contrary to state sovereignty.[198] Against this background,[199] the state's subsequent *allanamiento* before the Court (following an initial stage during which it denied the alleged violations) hardly seems to indicate a serious commitment to conform its practices in detention centers to the obligations of the American Convention.[200] As noted above, Venezuela has yet to comply with the Court's judgment as of this writing.

Because more than half of all *allanamientos* have occurred since 2005, many of the relevant compliance data are not yet available, making it difficult to generalize about their impact. Available compliance reports reveal that numerous *allanamientos* suffer from the same types of compliance problems as adversarial cases, especially regarding states' failure to investigate and prosecute human rights violators. This result supports the view that, at a minimum, *allanamientos* do not necessarily involve a greater commitment by the state to repair and prevent human rights violations than contestation by the state at all phases.

Turning the tables on international shaming. By offering *allanamientos*, states have been able to shorten the proceedings against them, reduce witness testimony, and in some cases avoid public Court hearings entirely (aspects that we discuss further below). These outcomes can allow states to bypass to a significant extent the negative publicity that might otherwise come from being denounced in public hearings or from having the Court find that, as between the petitioners (and/or the Commission) and the state, the former had proven their version of contested facts.

[195] Brazil recognized responsibility by acknowledging "the insufficiency, during the time of the events that led to the passing away of Sr. Damião Ximenes Lopes, of positive results in the implementation of public policies in mental health that would have made possible at that time a more effective process of accreditation and inspection" of the mental health facility in which the victim was beaten to death. Justiça Global, *Alegações Finais,* Damião Ximenes Lopes v. Brasil 3, Jan. 9, 2006.

[196] Montero Aranguren v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

[197] *See* Montero Aranguren v. Venezuela, No. 11.699, Demanda, paras. 17, 23 (Inter-Am. Comm'n H.R. Feb. 24, 2005), *available at* <http://www.corteidh.or.cr/expediente_caso.cfm?id_caso=233>.

[198] *Id.,* para. 28.

[199] This case comes within a broader context of resistance by Venezuela to the inter-American system. CEJIL notes:

> [T]he [Venezuelan] government has consistently taken an antagonistic position with regard to the Inter-American System, has openly questioned the need to comply with the decisions of the Commission and Court, and has failed to guarantee the protection of human rights defenders, some of whom are protected by precautionary and provisional measures, among others.

CEJIL, ACTIVITIES REPORT 2003–2004, at 67, *available at* <http://www.cejil.org/labores.cfm>.

[200] The Court recognized that Venezuela's engagement in the case had been contradictory for the reasons described above. *Montero Aranguren*, Inter-Am. Ct. H.R. (ser. C) No. 150, at 10–11, paras. 47–49.

Beyond avoiding negative publicity, moreover, *allanamientos* may enable states to reframe and gain more control over the Court setting, using it as a forum from which to project their image as human-rights-respecting democracies. This dynamic can be seen clearly when states issue *allanamientos* during public hearings. In the *Retén de Catia* case, for instance, despite its earlier attempt to retract its *allanamiento* and its initial contestation of the Court case, Venezuela declared at the public merits hearing that it had come to the Court to "honor the memory of those that have died, to acknowledge the truth and to seek justice."[201] The government also addressed the victims present in the courtroom, asserting that it had come to "acknowledge and repair all the pain that you have suffered."[202] In the same case, one of the victims' family members who was present wished to address the Court but was not given the opportunity to speak.[203]

We hesitate to cast state apologies and progressive statements on human rights in a negative light, considering that some governments (or at least some actors within those governments) may well be sincere. Nevertheless, we cannot help but note that when a government appears before a supranational tribunal and can focus attention prominently on its commitment to human rights and its solidarity with the victims, the state has to some extent changed its role from accused violator to magnanimous ally helping the Court to function and benefiting victims of past human rights abuses—a strategy that may work against the efforts of domestic advocates to denounce ongoing abuses.

Allanamientos *as a misleading model for advancing human rights.* Despite the sometimes-clear contrast between state recognitions of responsibility and real political commitment to accountability for human rights violations, both the international community and the public within a country may believe (to some extent) that an *allanamiento* resolves a human rights case or demonstrates a government's intent to address a broader problem in good faith. Indeed, reading an *allanamiento*—in which the state recites its apology and commitment to repair violations, the Court welcomes this response, and the petitioners themselves may feel obligated to thank the very state against which they lodged their complaint—may create the impression that the Americas have progressed to a point at which human rights issues are resolved through discussion and good-faith promises to improve. All of these factors may make the domestic populace reluctant to mobilize behind human rights campaigns that, in contrast to the *allanamiento*, insist that the state is continuing to violate the very human rights involved in a case. Yet, depending on the situation, this may be the more accurate narrative, and confrontation may be the more effective strategy in effecting real-world change.

Allanamientos may also undermine attempts to mobilize international pressure. In this regard, research on the correlation between countries' ratifications of human rights treaties and their actual human rights practices is instructive. Scholars studying the human rights behavior of states assert that they often ratify such treaties not out of an intent to improve their human rights practices, but precisely to deflect attention from their human rights failures, projecting a positive image and decreasing external scrutiny and pressure.[204] Applying the model to

[201] *Id.* at 9, para. 40.

[202] *Id.*, para. 42.

[203] Interview with Albán, *supra* note 145.

[204] *See, e.g.,* Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005). The results of Hafner-Burton and Tsutsui's global study demonstrate that on average, "[i]n no instance does state ratification of any of the six core UN human rights treaties

allanamientos, the image that states project when acknowledging violations in a particular case may serve to deflect pressure from the subsequent need to implement the actual Court judgment or improve the broader human rights situation.

That states sometimes seek to acknowledge responsibility for isolated cases while not allowing a case to generate pressure on a broader issue is demonstrated by the specific terms of the *allanamiento* in several Court cases. In *Servellón García v. Honduras*, for instance, the government recognized responsibility for the extrajudicial killings of four youths resulting from a mass arrest, but denied that these killings fit within a pattern of state-tolerated systematic human rights violations against youths.[205] Likewise, in *Rochela Massacre v. Colombia*, the government acknowledged the specified massacre but denied that this event took place within a context of paramilitary violence promoted by state policies.[206] In *Escué Zapata v. Colombia*, the case of an indigenous leader who had been shot to death by military agents, Colombia offered a detailed *allanamiento* but rejected the Commission's allegation that the victim's death fit within a pattern of retaliatory violence against indigenous leaders.[207]

In light of governments' sometimes-undisguised attempts to decontextualize alleged human rights violations, we worry that some states may now conceptualize resolving cases before the Inter-American Court as essentially a matter of trying to acknowledge responsibility for a limited violation and to pay a manner of fine to the petitioners. Considering how few violations reach the Court, it doubtless costs states less to agree to acknowledge specific facts and pay compensation to specific victims than to risk a full-fledged adversarial proceeding that results in greater pressure to enact systematic, resource-intensive reforms of its security forces, prison system, courts, mental health services, or other public agency.

State acceptance of legal violations to avoid rigorous fact-finding. As emphasized above, domestic advocates seek more from a Court case than simply a list of which articles of the American Convention have been violated. Equally or more important is the official narrative of facts that emerges from the litigation, which can serve as a tool for generating public support for a cause. We suggest that an overarching motivation for some states to offer *allanamientos* is precisely to terminate cases as quickly as possible and avoid drawn-out fact-finding against them.[208] Indeed, in the past this strategy has met with success.

predict the likelihood of government respect for human rights." *Id.* at 1398. Rather, state ratification often correlated negatively with signatories' behavior: "treaty members are more likely to repress their citizens than nonratifiers." *Id.* Hafner-Burton and Tsutsui maintain that the true value of treaty ratifications often lies in providing global civil society with tools for human rights campaigns, explaining, "Even though treaties often do not directly contribute to improvement in practice, the norms codified in these treaties are spread through INGOs that strategically leverage the human rights legal regime to pressure governments to change their human rights behavior." *Id.* at 1399.

[205] Servellón García v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 152, at 4, 17, paras. 16, 54 (Sept. 21, 2006).

[206] Rochela Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 163, at 21, para. 70 (May 11, 2007).

[207] Escué Zapata v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 165, at 4–5, paras. 11–12 (July 4, 2007). The Court ultimately declared that it did not have sufficient evidence to find that the victim's death fit within the alleged pattern. *Id.* at 21, paras. 63–64. Regardless of whether the Commission and petitioners' version of the factual context is accurate, this case draws attention to the potentially vast difference in advocacy impact between two judgments finding identical legal violations but having different factual narratives (e.g., one in which a murder is an isolated incident and another in which it is emblematic of a decades-long pattern of targeted repression). In light of this dynamic, states' attempts to decontextualize alleged violations in their *allanamientos* serve as a call for rigorous fact-finding regarding the context in each case.

[208] For an example of states' attempts to reduce witness testimony against them, see La Cantuta v. Peru, Resolution of the Court, *Considerando,* para. 16 (Inter-Am. Ct. H.R. Aug. 17, 2006) (on file with authors) (reporting Peru's unsuccessful attempts to block the testimony of numerous witnesses offered by the other parties on the grounds that, since the state had acknowledged many of the relevant facts and violations, their testimony would lack purpose).

The tendency for the Court to devote less time to evaluations of evidence and factual narratives in *allanamientos* was particularly salient in early examples of such cases. For instance, in the 1995 massacre case of *El Amparo v. Venezuela*,[209] Venezuela's acknowledgment of responsibility effectively brought the merits phase to an end. In a five-page judgment that set forth the facts in a few cursory paragraphs, the Court simply noted that the factual dispute no longer subsisted and ordered the government and the Commission to agree upon an amount for damages.[210]

In time, members of the Court recognized the potentially negative effects of reducing their factual analyses in the face of *allanamientos*. In the Guatemalan cases of *Myrna Mack Chang* (2003) and *Plan de Sánchez Massacre* (2004), Judge Sergio García Ramírez discussed *allanamientos* in detail, pointing out the advantages of supplementing state acknowledgments of responsibility with evidentiary analysis.[211] He underscored that an *allanamiento* should not automatically trigger the cancellation of live hearings; he also expressed the view that when judges lack a solid understanding of the facts of a case, the reparations are decided in a vacuum.[212] (Attorneys at the Commission echo this observation.[213])

In addition to providing necessary context for reparations orders, rigorous fact-finding can be crucial to informing the Court's merits judgments, in which we place particular importance on the sections setting forth proven facts. Among other considerations, we note that by including a full narrative of proven facts at the merits stage, the Court guards against the risk that a state's acknowledgment of certain facts might later be characterized differently by the government or local state agents.[214] The scope of the facts set forth in any given case is also crucial from a media perspective, not only because the media are generally interested in this aspect,[215] but also because the Court frequently orders violating states to publish the sections of its judgments containing proven facts in national newspapers as a reparations measure.

The Court's growing experience with *allanamientos* has led to improvements in the procedures and judgment format in more recent cases. Most important, the Court now routinely includes narratives of acknowledged facts in *allanamiento* judgments, considering the inclusion of those facts a form of reparation in itself. Furthermore, the Court evaluates the legal scope of *allanamientos*. If it is not satisfied that a state has acknowledged a certain fact or violation, it will declare that a controversy continues to exist as to certain parts of the case and will proceed to evaluate those parts.

[209] El Amparo v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 19 (Jan. 18, 1995).

[210] *See id.* at 3, 5, paras. 10–12, 20.

[211] *See* Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101, at 6–7, paras. 21–25 (Nov. 25, 2003) (García Ramírez, J., sep. op.); Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105, at 3–4, paras. 14–15 (Apr. 29, 2004) (García Ramírez, J., sep. op.).

[212] *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 105, para. 14 (García Ramírez, J., sep. op.).

[213] Interview with Albán, *supra* note 145.

[214] *Allanamientos* generally reference the facts listed in the Commission's *demanda* (application) as acknowledged. However, these factual narratives could potentially be deepened by witness testimony before the Court (although the parties cannot allege facts different from those in the *demanda*). In addition, the added advocacy value of facts set forth in a Court judgment, as compared to a Commission *demanda*, should not be underestimated.

[215] For instance, in *Montero Aranguren* (the *Retén de Catia* case), the Venezuelan media specifically reported the facts declared proven by the Court (including the available details about how the detainees were killed, such as that the guards used firearms and tear gas against them and that some detainees were shot from behind). *See, e.g.,* Edgar López, *Corte IDH condenó a Venezuela por masacre del retén de Catia*, EL NACIONAL (Venez.), Aug. 2, 2006, at B21 (on file with authors).

For instance, in the *Mack Chang* case, Guatemala acknowledged responsibility for the death of anthropologist Myrna Mack, but did so in ambiguous terms.[216] The Court subsequently conducted three days of hearings and heard thirteen witnesses in the case, after which it issued a judgment containing a detailed factual record.[217] In *Rochela Massacre v. Colombia*, the Court set forth the context within which the massacre had occurred, which clearly indicated that Colombia's internal laws and policies had helped to fuel paramilitary violence.[218] By addressing this context, the Court did not allow the state to avoid attention to the broader human rights issues exemplified by the case.

Despite marked improvements in the Court's factual analyses, in many *allanamiento* cases the Court's initial fact-finding is itself curtailed in the name of procedural efficiency. For instance, the Court may instruct witnesses scheduled to testify in *allanamientos* to focus on moral and material damages or on a specific question still in dispute, omitting testimony on the underlying facts of the case.[219] In other cases, the Court has shortened or omitted public hearings following an *allanamiento*.[220] Former judge Antônio Augusto Cançado Trindade has discussed this dynamic with great concern, arguing that the Court's decision not to hold a hearing in the 2006 case of *Servellón García v. Honduras* in light of the state's partial (but decontextualized) *allanamiento* reflected "the current senseless urge to decide on the greatest number of cases in record time" and had "deprived [the Court] of elements that could have enriched this Judgment."[221]

In light of the concerns expressed in this section, we suggest that the previously discussed risks of reducing the use of live evidence before the Court, particularly regarding potential loss of impact on domestic advocacy, apply as well to *allanamientos*. These risks may in fact take on greater importance in certain cases involving *allanamientos* due to attempts by states to decontextualize violations or minimize public proceedings against them. This understanding counsels strongly against reducing the scope of testimony or Court proceedings in cases of acknowledgment of responsibility without a careful evaluation of the potential disadvantages of this approach in each case.

Allanamientos*: final thoughts.* The Court cannot forbid states to acknowledge responsibility for their human rights violations. Were a state to commit itself in good faith to repairing past violations and avoiding future ones, it would doubtless respond exactly this way. At present, however, states' use of *allanamientos* sometimes falls short of this ideal. We suggest that states may offer *allanamientos* because years of experience have taught them that this strategy allows

[216] *See Mack Chang,* Inter-Am. Ct. H.R. (ser. C) No. 101, at 24, para. 100 (Nov. 25, 2003).

[217] *Id.* at 55–87, para. 134.

[218] Rochela Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 163, at 23–27, paras. 77–91 (May 11, 2007).

[219] *See, e.g.,* Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134, at 9, para. 37 (Sept. 15, 2005) (quoting *Mapiripán Massacre,* Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 122, at 12, para. 32(5) (Mar. 7, 2005)) ("The object of the testimony and expert opinions will be restricted as appropriate, regarding those parts of the merits, reparations, and costs with regard to which there is still a dispute among the parties.").

[220] *See, e.g.,* Montero Aranguren v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 150, at 4–6, paras. 21, 26 (July 5, 2006) (reduction in length of scheduled hearing); Servellón García v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 152, at 5, para. 18 (Sept. 21, 2006) (declaring hearing unnecessary). The Commission or representatives may also indicate that they no longer view live testimony as needed in light of an *allanamiento*; the final decision rests with the Court. *See, e.g.,* Vargas Areco v. Paraguay, Resolution of the Court, *Considerando,* para. 19 (Inter-Am. Ct. H.R. Feb. 7, 2006) (noting that the Commission did not consider live testimony necessary in light of the state's acknowledgment).

[221] *Servellón García,* Inter-Am. Ct. H.R. (ser. C) No. 152, at 1, para. 3 (Cançado Trindade, J., sep. op.).

them to bypass some of the most damaging aspects of inter-American litigation, turning a risk of costly international shaming into an opportunity to pay public lip service to human rights and possibly even to deflect attention from their substantive lack of structural reform. This is not to say that the existence of an *allanamiento* prevents a Court case from having a positive domestic impact; as just one example, *Barrios Altos v. Peru*, whose beneficial impact was already mentioned and will be discussed in detail in the following section, involved an *allanamiento* and has led to concrete advances in human rights on the ground.[222] We do not maintain that all *allanamientos* are given in bad faith. However, their increasing use, particularly when there is reason to suspect that at least some of them are *not* in good faith, does signify the emergence of potentially new obstacles to the capacity of supranational litigation to mobilize pressure on an issue.

In light of this reality, the Court would do well to continue refining its approach to *allanamiento* cases. As in all cases, the Court's effectiveness may often depend on the extent to which it elicits and sets forth a full narrative of proven facts. Moreover, the Court should take the initiative in limiting states' ability to use *allanamientos* to their own advantage at the expense of the system's resources. Options that the Court could consider include setting a time limit for *allanamientos* (such as that the state must acknowledge any violations in its initial submission for the *allanamiento* to be deemed voluntary); this measure might reduce the state practice of drawing out the system's resources through initially contesting cases, only, for example, to acknowledge responsibility at a public hearing. At a minimum, the Court might refuse to curtail witness testimony once public hearings are scheduled, regardless of the emergence of an *allanamiento*. Whether through these or other options, we contend that the Court will maximize its impact by responding to acknowledgments of responsibility in ways designed not only to conserve its resources, but to contribute strategically to pressure on the broader issues underlying a case.

Influences from Above and Below: Trends in Jurisprudence of the Inter-American Court

Since the creation of the Inter-American Court, its jurisprudence has evolved and expanded in several ways. First, the Court has recognized an increasing array of situations in which governments incur responsibility for rights violations. For instance, the Court will hold states accountable for a violation of the right to life not only if state agents kill a victim, but also if the state fails to take positive measures to protect victims from imminent harm[223] or to provide known groups of vulnerable victims with basic services needed for life.[224] Overall, the Court

[222] We have also noted that despite the state's highly questionable engagement in the initial stages of litigation in *Ximenes Lopes v. Brazil*, owing to the strength of the ongoing campaign on mental health policy generated by the death of Sr. Ximenes Lopes (including support from other sectors of government), the Court case helped to advance broader domestic advocacy efforts.

[223] *See, e.g.,* Pueblo Bello Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140, at 95–96, paras. 123–26 (Jan. 31, 2006) (discussing Colombia's liability for violations of the right to life due to, inter alia, the government's failure to adopt positive protective measures in light of the real and immediate risk to the victims of a massacre by paramilitary forces).

[224] *See, e.g.,* Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146, at 87, para. 178 (Mar. 29, 2006) (stating that Paraguay violated the right to life of nineteen individuals who died of treatable health conditions "since [the state] has not adopted the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of the Sawhoyamaxa Community").

has developed increasingly detailed and sometimes quite progressive understandings of the requirements of the system's human rights instruments, often drawing on developments from other systems such as the jurisprudence of the European Court, as well as on a growing universe of international declarations and norms. Finally, the range of the Court's reparations orders has expanded.

The Court's sometimes-progressive explications of protected human rights, frequently framed by reference to an overarching global system of human rights norms, enrich the content of inter-American jurisprudence, following (and on occasion leading) international legal understandings. However, while pushing the legal boundaries of human rights at the global level would necessarily translate into better human rights practices if states obeyed Court orders to the letter, here and elsewhere we have argued that this focus is potentially misplaced given the actual relationship between Court jurisprudence and its reception by many Latin American states.[225] Indeed, the Court continues to face passive noncompliance with even basic, established lines of jurisprudence (for instance, that states are obligated to investigate violations of the right to life committed by their own agents), as well as occasional explicit challenges to its authority. In this climate, the Court should be less concerned with expanding understandings of human rights than with maximizing the relevance and implementability of its jurisprudence.

In a positive development, the Court has demonstrated an awareness in recent years of the need for its jurisprudence to be more accessible to human rights activists and the public. In response to feedback from NGOs, governments, and others, it has reduced the length of its judgments. It has also moved away from highly philosophical dissenting opinions (formerly a common feature of its judgments). We recognize and welcome the Court's efforts in this regard. At the same time, making jurisprudence more accessible is only one necessary element in maximizing its potential to contribute to lasting change in a country.

In particular, the Court must familiarize itself with the political situation in a country and frame its jurisprudence (to the extent appropriate, in the event that violations are proven) to be relevant to this context. The Court will often maximize its impact when it sets forth a full narrative of the facts of a case and then declares that these facts violate recognized (or incrementally expanded) human rights norms. By contrast, visionary or philosophical jurisprudence may cause the Court to appear out of touch with realities on the ground and may hinder rather than advance respect for human rights. Further, Court orders that demonstrate insensitivity to the domestic situation may provoke backlash on the ground.

Advancing versus overlegalizing human rights. Laurence Helfer provides a detailed framework for understanding governmental backlash in response to supranational jurisprudence. Specifically, Helfer analyzes a case study from the Caribbean in which a supranational body (the Judicial Committee of the Privy Council, the highest appellate body originally exercising jurisdiction over British colonies) ordered that the Caribbean states subject to its jurisdiction reform their capital punishment procedures by ensuring that all domestic and international appeals of

[225] James L. Cavallaro & Stephanie Erin Brewer, *The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice*, 8 SUR INT'L J. HUM. RTS. 85 (2008), *available at* <http://www.surjournal.org>; Cavallaro & Schaffer, *supra* note 80.

death sentences be completed within five years.[226] This situation led to a "near de facto abolition of the death penalty" since the available appeal mechanisms, including use of the inter-American system, often took more than five years to complete.[227] The resulting commutation of numerous death sentences provoked such strong domestic resistance that Trinidad and Tobago withdrew its ratification of the American Convention to prevent further petitions to the inter-American system[228] and proceeded to execute several defendants in defiance of orders from the Inter-American Court.[229] On the basis of this case study, Helfer argues that if a supranational decision imposes new or more costly obligations on a state than those foreseen when the state ratified the treaty setting forth the relevant rights and duties (a situation that he terms *overlegalization*), resistance to the supranational decision is more likely.[230] Discussing the precise reasons that overlegalization by human rights bodies produces backlash, Helfer highlights the role of domestic pressure in accounting for resistance to supranational jurisprudence:

> Where a treaty's obligation . . . levels increase over time, *government discretion to achieve countervailing societal objectives in tension with human rights diminishes.* . . . "Overlegalization" exists where a treaty's augmented legalization levels require more extensive changes to national laws and practices than was the case when the state first ratified the treaty, *generating domestic opposition to compliance* or pressure to revise or exit from the treaty.[231]

We argue that further unpacking the part of Helfer's hypothesis concerning the role of domestic forces is the key to understanding the likely effects of supranational jurisprudence in a country. Under our view, overlegalization in a technical sense (i.e., the fact that a court decision expands the scope or enforceability of a human rights obligation) is just one of many factors to be considered. In states that are not receptive to supranational authority, even a court judgment that stays within clearly defined parameters and imposes no new duties may provoke resistance by the government, particularly if the judgment does not resonate with public understanding of an issue (e.g., in Trinidad and Tobago, the public strongly supported the death penalty; hence internal pressure ran *against* rather than *in favor of* implementing supranational orders on this subject[232]). On the other hand, sufficient media or external pressure, or strategic advocacy campaigns and public or governmental support for an issue, can bring about implementation of even an innovative judgment.[233] In other words, it is the confluence of a range of domestic factors, rather than the legal character of a supranational judgment itself, that most influences whether the judgment will have a practical effect in a country. Thus, staying in tune with local factors both within and outside a country's government is crucial to maximizing the impact of supranational jurisprudence.

[226] Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1871 (2002).

[227] *Id.* at 1879.

[228] *Id.* at 1881.

[229] *Id.* at 1882–83.

[230] *Id.* at 1910.

[231] *Id.* at 1854 (emphasis added).

[232] *See id.* at 1910.

[233] Indeed, Helfer acknowledges that the pace and degree of human rights innovation that will be successful in a country depend on a variety of pressure sources, including other states, transnational advocacy networks, and domestic opinion. *Id.* at 1855.

Further, to underscore that engagement within the inter-American system can be informed by the human rights situation in the country under consideration, we note that over the course of nearly five decades, the Inter-American Commission has carefully considered the domestic political conditions in the countries in which it has acted. Apart from its detailed consideration of such conditions during its on-site visits and in country reports (in which it enjoys a far greater margin of discretion than the Court in deciding how to frame and respond to domestic factors), the Commission's historic practice vis-à-vis the Court reflects a high degree of responsiveness to the human rights conditions in the region. For instance, when the Commission had discretion over which cases to submit to the Court (prior to the 2001 procedural reforms discussed above), it opted not to forward a variety of cases involving points of law on which sufficient consensus had not yet developed in the region (or in particular countries), and that would have risked states' rejection of Court determinations, leading to a net setback for the human rights issue in question.[234] The Commission's determinations of the invalidity of amnesty laws in Argentina and Uruguay (considered in greater detail below) typify this approach. Basing itself on its assessment of human rights conditions in those countries, as well as the state of development of international human rights law, the Commission chose to publish its reports on those matters rather than to forward them to the Court, thus avoiding possible undesired consequences for human rights (had the Court ruled against the petitioners) or for the perceived legitimacy of the Court (had the Court declared the laws invalid only to have this interpretation rejected by member states). The Commission took this approach, based on similar concerns, in other volatile cases.[235] While the analogy is not exact given the differing competence and roles of the Commission and the Court, this practice shows the general value of considering domestic factors instead of mechanically assuming that generating the largest amount of binding jurisprudence on an issue will most benefit human rights in the region.[236]

Taking this framework as the lens of analysis, we consider some illustrative cases from the Inter-American Court in which its jurisprudence has had a positive impact due largely to its relevance to the domestic political climate.

The influence of domestic climate on the acceptance of supranational jurisprudence. One context in which the positive impact of the Court's jurisprudence can be seen concerns the invalidity of amnesty laws in the region. The subject of amnesty laws first came before the inter-American system through a series of petitions in the 1980s. In 1992 the Commission declared that the Argentine and Uruguayan amnesty laws contradicted those states' human rights obligations.[237]

[234] Prof. Robert Goldman, former Commission member, Comments, *in* Overview, *supra* note 170.

[235] *Id.* Cases cited by Professor Goldman in which the Commission chose not to submit the matter to the Court include *Abella v. Argentina* (*Tablada* case), Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); *Gallardo Rodríguez v. Mexico,* Case 11.430, Inter-Am. C.H.R., Report No. 43/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996); and *Río Frío Massacre v. Colombia,* Case 11.654, Inter-Am. C.H.R., Report No. 62/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2000).

[236] In addition, the Court might consider ways of working more closely with the Commission to ensure implementation of the former's decisions. Given its experience in the countries that form the OAS and its understanding of the political dynamics in each of them, the Commission is well suited to design strategies to foster implementation of Court judgments. While the Commission, as a general matter, encourages states to comply with the determinations of the system, if it were to do this in greater coordination with the Court, the Court's results might well improve.

[237] Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992–93) (Argentina); Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. C.H.R., Report No. 29/92, *id.* (Uruguay).

However, in the aftermath of these states' transitions from military to civilian rule, the Argentine and Uruguayan governments viewed the amnesty laws as vital policy tools to ensure stability.

In response to the Commission's decisions, Argentina and Uruguay requested an advisory opinion from the Inter-American Court (Advisory Opinion OC–13),[238] challenging the Commission's competence to render decisions on the validity of domestic legislation. The Court upheld the Commission's competence in this regard,[239] but the political climate in the relevant countries remained hostile to the system's views on amnesty laws.

In 2001, however, the Court faced a far different political climate when considering *Barrios Altos v. Peru*,[240] a massacre case in which the Court declared Peru's amnesty law invalid. This decision dovetailed with recent events in Peru (notably the fall of the regime of Alberto Fujimori) and produced an immediate impact in the country. Human Rights Watch reported that "[w]ithin days of the decision, Peruvian police detained several alleged former members of the Colina death squad on murder charges, including two former generals. . . . In October, the Supreme Council of Military Justice annulled its 1995 decision applying the amnesty laws to the Barrios Altos and La Cantuta cases."[241]

Moreover, the decision contributed to human rights advances in the wider region. For example, Argentina's Supreme Court cited the *Barrios Altos* decision when declaring that country's amnesty laws unconstitutional in 2005.[242] Likewise, in the 2006 *Almonacid Arellano* case,[243] the petitioners successfully challenged the validity of Chile's amnesty law, benefiting from the *Barrios Altos* precedent. While the *Almonacid Arellano* decision was met with resistance by some institutions,[244] the president of Chile immediately declared that the judgment must be implemented,[245] and its Supreme Court soon cited the decision, as well as *Barrios Altos*, in holding that domestic legal norms cannot be used as obstacles to the prosecution of perpetrators of gross human rights violations.[246] Thus, the Inter-American Court's judgments lent support to the ongoing efforts by members of Chilean society, including important state actors, to limit the amnesty's effects.

As these examples demonstrate, the positive impact of the Court's amnesty law jurisprudence stems largely from the fact that the political landscape of the Southern Cone had shifted

[238] Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC–13/93, Inter-Am. Ct. H.R. (ser. A) No. 13 (July 16, 1993).

[239] *Id.,* paras. 30, 37, 57(1).

[240] Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

[241] Hum. Rts. Watch, *World Report 2002*, at 168, *available at* <http://www.hrw.org/wr2k2/pdf/peru.pdf>.

[242] *See* CSJN, 14/06/2005, "Simón, Julio Héctor s/ privación ilegítima de la libertad, etc.," Fallos (2005-328-2056), para. 24, *available at* <http://www.csjn.gov.ar>.

[243] Almonacid Arellano v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

[244] *See, e.g.,* Andrea Chaparro, *Suprema no reabrirá caso amnistiado pese a fallo de la Corte Interamericana*, LA NACIÓN (Chile), Oct. 17, 2006, *available at* <http://www.lanacion.cl/prontus_noticias/site/artic/20061016/pags/20061016212857.html> (reporting the view of the president of Chile's Supreme Court that the inter-American judgment was not binding).

[245] *See id.;* Macarena López, *Bachelet da fuerte respaldo a DD.HH y anuncia derogación de ley de amnistía*, EL MOSTRADOR (Chile), Oct. 14, 2006, *available at* <http://www.memoriando.com/noticias/101-200/164.html>.

[246] *See* Supreme Court of Chile, crim. ch., Molco Case, No. 559-2004, *Considerando,* paras. 19–20 (Dec. 13, 2006), *available at* <http://www.cecoch.cl/htm/htm/revista/docs/estudiosconst/revistaano_5_1_htm/sentenci_molco5_1-2007.pdf>.

dramatically since the time of the Commission's first amnesty law cases. The international proceedings against Augusto Pinochet in Europe initiated in late 1998; efforts by domestic judges, legislatures, and civil society groups to invalidate amnesty laws; and the growing distance between the current and former governments all contributed to a climate in which the invalidation of an amnesty could meet with both public and institutional support.[247]

As a second example, returning to the classic case of *Velásquez Rodríguez*,[248] one can observe the beneficial effects of the interaction of creative, yet pragmatic, jurisprudence with a supportive regional public. Before the Court issued its judgment in the case, it was not self-evident that the existence of a pattern of forced disappearance in Honduras would suffice to lead to a finding that the state had violated the victim's right to life. However, when the Court employed this line of reasoning to come to this conclusion, its opinion resonated with the knowledge in civil society, segments of the media and the Honduran public, and the region regarding state responsibility for forced disappearances. For instance, civil society reports and media in other countries had increasingly shed light on the nature of the practice of forced disappearance in the region, and in Honduras in particular.[249] As a result, despite the jurisprudentially innovative nature of the judgment, for large majorities of Latin Americans, the Court had merely filled in the missing links of legal reasoning needed to hold Honduras accountable for crimes of which it was widely believed to be guilty.

The main conclusion to be drawn from these case studies is that the Court's rulings will rest on firm ground—even those that innovate, require policy changes, or meet with resistance from interested actors—when they mesh with parallel civil society developments and broad societal understanding of a given issue. Once again, we do not highlight these examples to argue that the Court should limit itself to issuing opinions that will be accepted without argument in the reigning political climate. Rather, the determining factor in finding any alleged violation should always be that the evidence and arguments put forth by the parties led the Court to come to a given conclusion. Nevertheless, some amount of maneuvering room will generally be left to the Court in determining the content of its jurisprudence, the exact form of its reparations orders, and whether or not to expand upon prior understandings of a legal instrument.[250] What

[247] For a thorough analysis of the impact of the proceedings against Pinochet on domestic efforts to achieve accountability for abuses by military regimes in Latin America, see NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

[248] Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

[249] *See, e.g., 3 Human-Rights Groups Say Abuses Increase in Honduras*, N.Y. TIMES, Feb. 10, 1984, at A8; Americas Watch (Hum. Rts. Watch), *Honduras: Inter-American Court of Human Rights Wraps up First Adversarial Case* 2–3, Sept. 5, 1990, *available at* <http://hrw.org/reports/pdfs/h/honduras/honduras909.pdf> (describing HRW's fact-finding trips to Honduras in the 1980s and listing several reports that it published following these trips, publicizing the methodology of forced disappearances).

[250] Commenting on the success of the ECHR and the European Court of Justice in the mid-1990s, Helfer and Slaughter discuss the interplay between judicial independence and strategic decision making in terms helpful to the present discussion:

> [T]ribunals must be willing to brave political displeasure, searching always for generalizable principles, even as they search for formulations or procedural mechanisms to render the principles more palatable to the states concerned.
>
> . . .
>
> Bold demonstrations of judicial autonomy by judgments against state interests and appeals to constituencies of individuals must be tempered by incrementalism and awareness of political boundaries.

Helfer & Slaughter, *supra* note 8, at 314.

we suggest, then, is that the Court bear in mind the close connection between political climate and the types of judgments that are likely to be implemented, working within the parameters of the facts and legal conclusions in a given case to maximize the extent to which a decision will resonate at the domestic level.

In some recent judgments, by contrast, the Court has delivered opinions that arguably demonstrate a disproportionate focus on expanding jurisprudence at the international level while failing to take full account of the social and political realities that obstruct the advancement of the human rights in question. In line with our arguments above, these types of decisions have sometimes led to resistance by states.

Ahead of its time or out of touch? Advisory Opinion OC–18. One notable example of the Court's attempts to promote visionary jurisprudence occurred in the 2003 Advisory Opinion OC–18, entitled *Juridical Condition and Rights of the Undocumented Migrants*.[251] This opinion arose out of a request by Mexico for clarification of states' obligations toward undocumented workers following a 2002 ruling by the U.S. Supreme Court that an undocumented employee from Mexico, fired in retaliation for union organizing, was not eligible for an award of back pay from the National Labor Relations Board.[252] The main question presented by the Mexican government was whether it is permissible to deny certain labor protections to workers on account of their irregular migratory status.[253]

The Court could have decided the issue before it on the grounds that certain labor rights are fundamental (as sustained by the Commission[254]) and that among these is workers' entitlement to full remedies for unjust termination due to union activities regardless of immigration status. However, the Court instead framed its reasoning within a broad and philosophical framework of nondiscrimination. The advisory opinion begins with a discussion of the nature of the right to equality—a right, the Court pointed out, that "springs directly from the oneness of the human family."[255] Following this sweeping tone, the Court held in an unprecedented step that nondiscrimination on all grounds had attained the status of *jus cogens* in international law.[256]

The Court then declared that all workers, regardless of migratory status, are entitled to all labor protections provided in international, national, and local law.[257] Advisory Opinion OC–18 thus represents the most progressive jurisprudence to date on the labor rights of undocumented migrants.[258] Its novel character has been recognized by various scholars in the field, who state that it goes "significantly further than existing pronouncements."[259] In concurring

[251] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC–18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

[252] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002).

[253] Advisory Opinion OC–18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 4.

[254] *Id.,* para. 47.

[255] *Id.,* para. 87 (quoting Juridical Condition and Human Rights of the Child, Advisory Opinion OC–17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, para. 45 (Aug. 28, 2002)).

[256] *Id.,* para. 101.

[257] *Id.,* paras. 153, 155.

[258] *See* Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547, 586–87 (2004).

[259] *See, e.g.,* Sarah H. Cleveland, Case Report: Legal Status and Rights of Undocumented Workers. Advisory Opinion OC–18/03, *in* 99 AJIL 460, 463 (2005).

with the opinion, Judge Cançado Trindade notes that it is "of great transcendence" and "pioneering."[260] To be sure, the Court's holding grants a larger array of rights to undocumented migrant workers than the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[261] In this Convention, certain rights (including the right to found trade unions) apply only to workers who are documented or in a regular situation.[262]

In light of the high bar for recognition as a *jus cogens* norm,[263] it appears improbable that a norm prohibiting the denial of any labor protections to undocumented workers could be such a universally agreed-upon precept.[264] This holding therefore risks weakening the perceived relevance and implementability of the Court's decision in countries that are still far from recognizing this norm.[265]

Further, a sweeping norm of nondiscrimination is unlikely to summon up the same vivid imagery or rallying cry for national workers' movements as would, for example, an opinion focused on a core set of fundamental labor rights or a strong condemnation of union busting. If anything, since the latter approach does not spotlight the undocumented status of the workers, it might avoid polarizing opinion and provoking prejudiced or nationalistic counterreactions. This observation does not mean, of course, that activists have not incorporated the actual OC–18 opinion into their existing labor rights campaigns. In fact, labor rights activists use the opinion in local organizing campaigns and in educating workers about their rights.[266] Our point, however, is that rather than issuing the most readily implementable decision possible, the Court has produced one that may appear too far removed from daily life to attract widespread public support or institutional cooperation.

Nor has Advisory Opinion OC–18 yet brought about clear improvements in the treatment of migrant workers in the region. Indeed, the labor laws of Mexico, the country that requested the advisory opinion, continue to forbid non-Mexicans from holding leadership positions in

[260] Separate Opinion of Judge A. A. Cançado Trindade, Advisory Opinion OC–18/03, para. 1.

[261] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158 (Dec. 18, 1990), *available at* <http://www2.ohchr.org/english/law/cmw.htm>.

[262] *Id.,* Arts. 26, 40. The older ILO Convention No. 143 (the Migrant Workers Convention of 1975) also enshrines different levels of protection based on migratory status. International Labour Organization, Migrant Workers (Supplementary Provisions) Convention (No. 143), Arts. 8–10, June 24, 1975, *available at* <http://www.ilo.org/ilolex/index.htm>.

[263] As mentioned by the Inter-American Commission in its brief in Advisory Opinion OC–18, previously the body of *jus cogens* norms was restricted to a very small number of rights, such as freedom from slavery, genocide, apartheid, and arguably racial discrimination. Dictamen de la Comisión Interamericana de Derechos Humanos en aplicación de los Artículos 57 y 64 de la Convención Americana sobre Derechos Humanos at 6 (Jan. 2003) (submitted to the Inter-American Court of Human Rights) (on file with authors).

[264] For a discussion of the various human rights norms that the Inter-American Court has held to be *jus cogens*, see Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101 (2008). Professor Neuman also presents a detailed critique of the Court's reasoning in Advisory Opinion OC–18.

[265] Professor Douglas Donoho notes that while "[e]nforcement mechanisms regarding well-defined, universally accepted rights for which international consensus over meaning exists will be . . . more readily accepted by governments," attempts to "enforce specific applications of human rights that are subject to genuine cultural and political dispute inevitably raise concerns about overreaching." Douglas Donoho, *Human Rights Enforcement in the Twenty-first Century*, 35 GA. J. INT'L & COMP. L. 1, 49–50 (2006).

[266] Telephone interview with Sarah Paoletti, Transnational Legal Clinic, University of Pennsylvania Law School (May 24, 2007).

trade unions.[267] Overall, then, the opinion may reflect a Court focused on an idealized view of human rights law rather than on the development of jurisprudence most relevant to the challenging and often domestically unpopular field of migrant workers' rights.[268]

More harm than good: backlash to politically unpopular reparations orders. Over the years, the Court has greatly expanded its jurisprudence in another area, the content of its reparations orders to states. In particular, the Court's inclusion of symbolic reparations measures as a regular element of its judgments is a progressive feature that goes well beyond the precedents of, for example, the European Court. Moreover, these symbolic reparations have become more detailed and varied in recent years. It is now standard practice for the Court to order states to hold public apology ceremonies. Other symbolic measures include establishing monuments to victims, naming schools after them, and establishing memorial scholarships in their honor.

The Court's issuance of symbolic reparations is a positive step insofar as it signals an awareness that its judgments will have greater impact when they receive public attention within a country. For instance, a public apology will likely receive domestic media coverage. Any such advocacy benefits, of course, supplement those conferred on the victims by such reparations. Yet in some recent decisions the Court has issued reparations orders of a precisely detailed nature, instructing states not only to undertake general tasks, but also to carry them out in a specific way. When such reparations orders are perceived by the domestic community as out of touch with their day-to-day reality, or as overreaching on the part of the Court, they can provoke hostile reactions by both states and the general public.

One case that highlights the potentially negative consequences of jurisprudence that clashes with domestic conditions is *Miguel Castro Castro Prison v. Peru*. In this case, the Court considered the deaths of dozens of inmates and abuses against hundreds more in the Castro Castro penal facility,[269] resulting from politically motivated attacks against a particular segment of the prison population. The attacks targeted those detained in the pavilion associated with the Sendero Luminoso, a domestic movement identified by the Peruvian public as a terrorist group.[270] Among other reparations orders, the Court directed the Peruvian state to inscribe the names of the victims on a monument known as The Eye That Cries,[271] which currently bears the names of individuals who died in the internal conflict in Peru from 1980 to 2000, including police, military agents, and civilian victims of political violence.

[267] Ley Federal del Trabajo, Art. 372(II), *as amended*, Diario Oficial de la Federación, 17 de enero de 2006, *available at* <http://info4.juridicas.unam.mx/ijure/fed/>. This law remains in force despite recommendations from the UN Migrant Workers' Committee that it be amended. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations: Mexico, para. 36, UN Doc. CMW/C/MEX/CO/1 (Dec. 20, 2006).

[268] One could argue that, particularly if the Court expects low compliance with regard to certain unpopular issues such as migrants' rights regardless of the form that its jurisprudence takes, it might just as well set forth a progressive vision to influence scholars and judges in other regions and to set the stage for later progress once the social and political climate improves. This argument would take a longer-term view of the effectiveness of a human rights court. However, we question this approach given the uncertainty that visionary jurisprudence will achieve the desired goals in the future, coupled with the more certain outcome of resistance that such jurisprudence can generate in the present.

[269] Miguel Castro Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160, at 2, para. 3 (Nov. 25, 2006).

[270] *See id.* at 61–63, paras. 197(13), (16).

[271] *Id.* at 167, para. 470(16). The Commission and the victims' representatives had suggested the creation of a monument to the victims as a measure of symbolic reparations; in an apparent attempt to avoid the construction of such a monument, the state referenced the existence of The Eye That Cries, a monument officially dedicated to all victims of political violence. *Id.* at 163, para. 453.

An enormous political and societal backlash resulted from the order to include suspected and convicted terrorists on the very monument dedicated largely to remembering victims of terrorism.[272] The families of persons whose names already appeared on the monument expressed shock, while Peruvian president Alan García added to the climate of indignation by forcefully rejecting the judgment in general as "outrageous" and using it as a platform to condemn terrorism and portray the Court as a distant institution without the knowledge or moral authority to issue such a decision.[273] During the following year, the debate over having the monument possibly honor terrorists (inflamed by subsequent reports that at least some of their names already appeared there[274]) reached such proportions that a popular campaign was launched to have it demolished and it was vandalized, prompting fears of violence and forcing domestic human rights organizations to mount a public defense campaign.[275] More far-reaching than the debate over the monument itself, of course, was the nationalistic, intolerant discourse provoked by the judgment.

These negative effects, while significant in scale, were not entirely unforeseeable. While reparations orders often include some form of symbolic reparation, this particular reparations order falls into a more intrusive category, in that it mandates alteration of an existing monument to include the names of a politically unpopular group whose presence (in the minds of many Peruvians) would contradict the monument's meaning. A more careful evaluation of the likely effects of issuing this order might have led the Court to refrain from ordering this form of symbolic reparations. Indeed, as this article went to press, and after receiving further written arguments from the Peruvian government, the Court modified its reparations order to allow Peru to construct a new park or monument rather than inscribe the victims' names on The Eye That Cries.[276]

Simplified judgments: an opportunity to focus on facts. In a positive development, over the past year the Court has signaled that it recognizes the need to make its jurisprudence more accessible. Most notably, beginning in 2007 the Court pioneered a new, simpler format for its judgments. On its Web site, the Court explains that its decision to modify its judgment format "stems from requests the Court has received from Member States . . . , universities and scholars in the region, and civil society organizations, among others, as well as from its own thinking on the matter."[277] The announcement further states, "The new format reduces the length of judgments . . . without compromising the analysis of the evidence and allegations of the parties or limiting the relevant considerations of fact and of law."[278]

[272] *See* Mario Vargas Llosa, *El ojo que llora*, EL PAÍS (Spain), Jan. 14, 2007, *available at* <http://www.elpais.com/articulo/opinion/ojo/llora/elpepiopi/20070114elpepiopi_5/Tes>.

[273] Dan Collyns, *Peru Slams Ruling on Rebel Rights,* BBC NEWS, Jan. 10, 2007, *available at* <http://news.bbc.co.uk/1/hi/world/americas/6246917.stm>.

[274] In an article attacking the Court judgment, the domestic newspaper *Correo* reported finding two of the relevant names already inscribed in the monument, a discovery that prompted the mayor to vow to remove all names of "subversives" from the monument. *Terroristas en "El ojo que llora,"* CORREO, Jan. 11, 2007, *available at* <http://www.correoperu.com.pe/lima_nota.php?id=40746>.

[275] *See Este jueves protestan por ataque a 'El Ojo que Llora,'* AGENCIA ANDINA, Sept. 25, 2007, *available at* <http://www.adehrperu.org/noticias-ddhh/este-jueves-protestan-por-ataque-a-el-ojo-que-llora.html>.

[276] Penal Miguel Castro Castro v. Perú, Interpretación de la Sentencia de Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 181, at 17, para. 57 (Aug. 2, 2008), *available at* <http://www.corteidh.or.cr/docs/casos/articulos/seriec_181_esp.pdf>.

[277] Inter-Am. Ct. H.R., New Format for Judgments, *available at* the Court's Web site (Oct. 2008).

[278] *Id.*

The Court's recognition of the need to simplify its jurisprudence and to listen to the critiques of observers is welcome. A survey of the cases issued in the Court's new format thus far leads us to suggest that the move toward shorter, simpler judgments has the potential to be beneficial. For instance, the Court's previous judgments routinely included long introductory sections recording the dates that briefs were filed, observations received, and affidavits submitted, along with other procedural data that can be greatly condensed without reducing the utility of the judgment.

The move toward shortening judgments highlights the need for the Court to conserve those aspects of its decisions with the greatest potential impact. In its new judgments, the Court has cut back the amount of space dedicated to reporting the testimony of witnesses in the initial section of its decisions. Whereas the Court formerly set forth at least a paragraph summarizing each witness's testimony, the new format simply mentions the names of the witnesses and the topics on which they testified.[279] The Court now generally moves from introductory matters directly into an analysis of each right or group of rights allegedly violated. In these sections it incorporates those facts deemed necessary to its legal analysis.

This format does not prevent the Court from including detailed factual accounts. For example, in *Rochela Massacre v. Colombia* the Court sets forth a valuable narrative of the context of state involvement in paramilitary violence[280] before describing the actual massacre.[281] At the same time, the judgment clearly contrasts with earlier decisions such as *Mapiripán Massacre v. Colombia*, in which highly detailed discussions of paramilitary operations and the state's responsibility for a massacre were complemented by more than fifteen pages narrating witness testimony and affidavits, as opposed to roughly three pages in *Rochela.*[282] Time will tell whether this difference will affect the media impact or other effects of the Court's new judgments.[283]

The Court's streamlined format for judgments, then, once again underscores the potential tension between procedural efficiency and impact at the domestic level. We hope that as the Court solidifies its new judgment format, it does so in a way that gives priority to factual narratives, understanding that these may be among the elements of its judgments most likely to influence human rights practices on the ground.

V. CONCLUSION: LOOKING BEYOND THE AMERICAS—AND BEYOND THE COURTROOM

Throughout this piece, we have identified trends in the cases of the Inter-American Court that give us cause for concern. Despite the critiques we have raised, however, we believe that

[279] *See, e.g.,* Escué Zapata v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 165, at 8, para. 24 (July 4, 2007).

[280] Rochela Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 163, at 22–31, paras. 73–100 (May 11, 2007).

[281] *Id.* at 34–37, paras. 105–20.

[282] Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134, at 17–32, paras. 75–76 (Sept. 15, 2005); *Rochela Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 163, at 15–18, paras. 57–58.

[283] Further, not all of the Court's new judgments have set forth detailed factual contexts for each violation found; this lack is especially of concern with respect to violations of the duty to investigate, which may be complex and consist of many stages. In *Bueno Alves v. Argentina*, for example, the Court found that the state's investigations and judicial proceedings violated the American Convention. To support this conclusion, the Court referenced several facts, such as the delay in performing a medical examination on the victim following his denunciation of torture. Bueno Alves v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 164, at 23–25, paras. 110–16 (May 11, 2007). However, a fuller, chronological summary of the state's investigative and judicial processes, drawing on concrete events by specific actors in these processes, could have aided in both the clarity and completeness of this discussion.

the Court can maintain and potentially increase its often-significant real-world impact on human rights issues. To do so, we argue, it should critically evaluate the domestic impact of some of its recent procedural modifications and jurisprudential holdings, keeping in mind that its effectiveness often depends on the relevance of its operating procedures and decisions to the human rights context within a country. Appreciating this role will enable the Court to strengthen its working methods as it seeks the proper balance between procedural efficiency and detailed fact-finding, between diplomatic and adversarial engagement with governments, and between progressive philosophy and realist responses to decidedly unprogressive human rights situations. When it strikes this balance well in a given case, past experience demonstrates that, for the moment, its job is finished. It then falls to domestic actors to carry the Court's judgment forward by incorporating it into their broader efforts to enhance respect for human rights.

Moreover, as the human rights landscape in the European system moves closer to the context in the Americas and as the African Court prepares to begin its work, we believe that the model of supranational litigation and advancement of human rights applicable to the Inter-American Court will be increasingly relevant in other parts of the world. We encourage scholars and practitioners working in all systems to consider the processes of human rights change most suited to different countries and regions, as well as how regional or international human rights mechanisms can contribute most effectively to those processes. By understanding and responding to these unique processes of change, we argue, supranational tribunals can maximize the chances that the ideal of human rights adjudication will translate into substantive improvements in the lives not only of petitioners to their systems, but of the far larger universe of individuals who will never see the inside of a supranational court.

Journal of Interdisciplinary History, xxxix:2 (Autumn, 2008), 233–244.

James L. Cavallaro and Stephanie Erin Brewer

Never Again? The Legacy of the Argentine and Chilean Dictatorships for the Global Human Rights Regime

Thomas C. Wright. *State Terrorism in Latin America: Chile, Argentina, and International Human Rights* (Lanham, Rowman & Littlefield, 2007) 286 pp. $80.00 cloth $29.95 paper

Sonia Cardenas. *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia, University of Pennsylvania Press, 2007) 200 pp. $65.00

Within the past three decades, human rights have moved from the periphery to the mainstream of political interest, particularly in Latin America. In international relations, and in the internal political discourse of many states, human rights have become a central, even a dominant theme. This apparent success of the human rights movement renders it difficult to appreciate the significantly different landscape that prevailed more than thirty years ago. In 1975, only one of the eight core United Nations human rights treaties had come into force.[1] Only two states had ratified the principal rights treaty in the Americas, the American Convention on Human Rights. Since then, the vast majority of the world's states have ratified a range of universal treaties, as well as regional con-

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1 The International Convention on the Elimination of All Forms of Racial Discrimination entered into force on January 4, 1969.

ventions, that specify a broad range of individual rights and create supervisory bodies. In Latin America, ratification of some of these treaties is nearly universal. Thirty out of the thirty-four active members of the Organization of American States have now ratified the International Covenant on Civil and Political Rights, twenty-four have ratified the American Convention on Human Rights, and twenty-one have also accepted the compulsory jurisdiction of the Inter-American Court of Human Rights.

Another recent advance, from the perspective of the enforcement of human rights norms, is the establishment by the United Nations of international criminal tribunals (ICTs) for Rwanda and the former Yugoslavia, as well as similar courts created in response to other situations of mass atrocity. The ICTs are the first such courts to emerge since the Nuremberg and Tokyo tribunals a half-century earlier. In 2002, the international community advanced even further with the establishment of the International Criminal Court (ICC), the first permanent, supranational tribunal to try grave violations of, among other things, core human rights.

Yet, despite this remarkable normative advance, relatively little has changed during the past thirty years concerning the means of forcing recalcitrant states to respect the most basic rights of their citizens. Now, as before, domestic factors and local activist groups, far more than international pressures or treaties, are the main driving forces motivating states to respect human rights. International pressure can be important as a stimulus for change, but its impact on the practices of individual states is limited largely by domestic political conditions. Even the ICC, an institution that promises supranational justice for rights offenders, operates within the principle of complementarity, which permits the Court to engage only if and when the state in which a defendant is located is unable or unwilling to prosecute successfully. This restriction, along with a number of others, makes prosecution by the ICC the exception to the basic rule of human rights enforcement—domestic resolution of the problem (prodded, perhaps, by international pressure) or no resolution at all.[2]

2 The ICC has jurisdiction over genocide, crimes against humanity, and war crimes committed after July 1, 2002 (the date when the Rome Statute for the ICC entered into force), only when these crimes are committed in the territory of a state that is party to the Rome Statute or by one of its nationals, unless the situation is referred to the ICC Special Prosecutor by the UN Security Council, or the state in question voluntarily accepts the ICC's jurisdiction. See

Given these limitations, the question for those seeking to promote the defense of human rights becomes, Under what kind of international pressure are states likely to curtail rights abuses? To answer this question, scholars have turned to the experience of Latin America's Southern Cone in light of the region's history of military dictatorships and human rights activism.

Two recent books, Wright's *State Terrorism in Latin America* and Cardenas' *Conflict and Compliance,* consider this issue in the context of the repressive regimes that brutalized Chile and Argentina during the 1970s and 1980s. The two narratives are similar in their broad strokes, reporting the often limited influence that human rights advocates had on the practices of these dictatorships. But the ultimate conclusions that these works draw regarding the potential of international human rights mechanisms to deter future abuses differ in notable respects.

Wright provides a comprehensive overview of state-organized terror in Chile and Argentina during the 1970s and 1980s. He analyzes, in roughly chronological order, the political factors that gave rise to these countries' dictatorships; the techniques of repression and manipulation that facilitated their continued rule; and the long, ongoing processes of transitional justice in each society. He also explores the struggles of the grassroots organizations that developed in both countries to defend human rights, exploring how domestic activists from the early stages of the dictatorships to the present day have tried to bring rights violators to justice. More ambitiously, he traces the growth of the international human rights movement from what might be termed its first major, global challenge—the 1973 coup in Chile and the atrocious abuses of the Pinochet regime—to 2006. He argues that the Southern Cone cases helped to shape the current international human rights system in ways that increase the chances of deterring would-be violators today.

The issues that Cardenas examines overlap with those that concern Wright to some extent, but she focuses primarily on the causal relationship (to the extent that one exists) between international pressure and change within rights-abusing states. She finds

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ICC, *The ICC at a Glance,* available at http://www.icc-cpi.int/library/about/ataglance/ICC-Ataglance_en.pdf. On a more practical level, funding limitations further restrict the potential scope of the ICC's work.

that international pressure is significantly limited in its capacity to alter domestic practices, which, she argues, respond far more to local political factors. As a result, her analysis leads to a less sanguine view about the prospects of advancing human rights mainly through international channels.

STATE TERRORISM AND THE DEVELOPMENT OF HUMAN RIGHTS ENFORCEMENT Wright's *State Terrorism* accurately notes several instances in which human rights pressure has correlated with improved practices in the Southern Cone. Despite such examples, however, the book's characterizations of the current human rights system's ability to influence state behavior appear to be overly optimistic. In particular, by situating his narrative within a roughly (though not entirely) linear progression from a "stage of monitoring" to a "stage of enforcement," Wright gives insufficient weight to the more somber aspects of the events that he chronicles. Although the international recognition of human rights norms has certainly improved, accompanied by highly visible advances in efforts to hold some violators accountable for mass atrocity, the fundamental ability of international human rights mechanisms to dissuade and punish violations at a global level remains relatively low. Indeed, both recent scholarship and the current incidence of abuse occurring throughout the world suggest that the ability and resolve of the global system to limit and punish rights violations has not significantly advanced for the past three decades. As in the Southern Cone in the 1970s, changes in human rights practices continue to be driven more by domestic political forces and the capacity of local groups to deploy human rights discourse effectively than by international pressure.

THE SOUTHERN CONE DICTATORSHIPS: FROM HUMAN RIGHTS CRISIS TO HUMAN RIGHTS REVOLUTION? Wright opens with an overview of international human rights treaties, monitoring bodies, and war crimes tribunals, beginning in the aftermath of World War II and ending triumphantly with the establishment of the ICC. Having set forth this broad framework, he surveys the widespread human rights crisis that engulfed much of Latin America in the wake of the Cuban Revolution, explaining how governments in the region reacted to the real or perceived threat that left-wing political groups within their borders would follow the Cuban example.

Their political strategies produced actual or *de facto* military regimes and grave violations of human rights in countries where the majority of the region's population lived (18).

The bulk of Wright's book is an in-depth account of the Chilean and Argentine dictatorships. His cogent descriptions of their rise to power, their evolving structures, and their systematic abuses provide an excellent overview of this period, particularly for those new to the field. Those already familiar with the mechanics of these governments' human rights offenses will find that Wright's analysis of the political and social factors underlying the initial coups and contributing to longer-term support for these regimes provides an added layer to the understanding of the domestic climate at the time.

Wright next traces the alternating advances and retreats in contemporary efforts to bring to justice the government officials responsible for dirty-war, human rights violations. In discussing these processes, including the factors influencing domestic public opinion for and against accountability, Wright once again offers a detailed and readable account (although, as he acknowledges, significant scholarship already exists on this subject).[3]

Wright's narrative seeks to make a novel contribution to the existing scholarship in its analysis of the reciprocal relationship between the regimes in Chile and Argentina and the developing international human rights system (15). He focuses on the role of intergovernmental and international human rights bodies in exposing and pressuring the military dictatorships of the Southern Cone, as well as on how the structure and activity of these human rights bodies evolved as they responded to the Chilean and Argentine situations. Wright concludes that the interaction of these institutions with the two Southern Cone regimes led to the development of more and tougher international human rights standards and, more significantly, "the tools necessary to enforce those standards," thus fortifying the international human rights system in ways that resonate well beyond the Southern Cone (32, xv).

Wright's introductory overview of the evolution of the international human rights framework seeks to support this thesis by portraying the ascendance of the international system from the 1970s, when the norms were "incomplete and virtually untested,"

3 For the preexisting scholarship, see, in particular, Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, 2005).

to an intermediary "stage of enforcement" and finally to the current "age of human rights" (225).[4] In particular, Wright hails the creation of the ICC as "the greatest step yet taken toward making international human rights treaties enforceable" (13). Barring successful U.S. interference, Wright anticipates that the Court may usher in a "new world order with effective deterrents to crimes against humanity" (13–14).

Despite visible advances in the human rights framework, however, there is reason to doubt these optimistic characterizations of the global rights regime's potential power; many of these reasons for skepticism become clear in Wright's analyses of domestic political conditions during the Southern Cone dictatorships. Unpacking his thesis regarding the connection between events in the Southern Cone and the deterrent potential of today's human rights mechanisms requires a critical look at both the specific results of human rights pressure in the Southern Cone and the accuracy of Wright's assessment of the current global human rights machinery. Wright is correct that the Chilean and Argentine dictatorships left their mark on the structure and methods of the current human rights movement and that this movement proved valuable to domestic advances in those countries. Nonetheless, his evaluation of the power of the resulting global system to deter future atrocities through the threat of international prosecution finds less support in available data.

The features and characteristic violations of the Chilean and Argentine dictatorships, as well as of similar authoritarian regimes elsewhere, certainly influenced the content of human rights norms—as seen, for example, in the drafting of United Nations and inter-American treaties specifically addressing forced disappearance (125). The situation in Chile was especially instrumental in providing the impetus for international human rights bodies to refine or expand their monitoring activities and in provoking several detailed investigations and harsh condemnations of human rights practices during that era (75).

Wright also notes several instances in each country when international human rights advocacy (for example, a report by the

4 Elsewhere in the book, Wright phrases these conclusions in less ambitious terms: "[The influence of the Chilean and Argentinean cases] might possibly influence would-be repressors in any part of the world before they act, and in that small way help nudge the international human rights regime toward another stage in its evolution—the stage of deterrence" (232).

Inter-American Commission on Human Rights) coincided with increased public opposition to human rights abuses and to improvements in the regimes' practices. In such cases, robust international monitoring, reporting, visiting, etc., often result in increased advocacy opportunities for domestic activists, who may be able to leverage these activities at strategic moments to generate public opposition to government practices. In this regard, Keck and Sikkink reference the evolution of Argentina's military dictatorship's practices in explaining their boomerang theory of international influence on domestic human rights situations (107).[5] In this theory, domestic advocates employ international allies to shame and pressure a government on the global stage, thus amplifying the domestic groups' own demands and ultimately serving to "echo back these demands into the domestic arena."[6]

Yet, notwithstanding the undeniable, positive contribution of the nascent international human rights system to domestic efforts in Chile and Argentina, to conclude that the human rights system has reached the point at which it can trigger greater levels of protection or accountability for human rights undervalues the persistent constraints on these responses.

First, it is necessary to determine systematically when and how international human rights pressure can cause a fundamental change in the practices of a state. Cardenas' study of the interactions between the Chilean and Argentine dictatorships and the international human rights system, complemented by her statistical analyses of 172 countries during a five-year period in the 1990s, provides data for a fuller analysis of this question. Though acknowledging that international pressure led to improved human-rights practices in Argentina and Chile during the 1970s (65), she emphasizes that such influence tends to dissipate in the face of countervailing domestic factors. She notes that even as Argentina publicly committed to international norms in 1977, its security agents forcibly disappeared more than 3,000 people that year and opened four new clandestine detention centers (69). In Chile, Augusto Pinochet's henchmen intensified the use of torture in 1979 and 1980, despite growing criticism from the human rights community (67–68). This pattern demonstrates that although a re-

5 Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, 1998).

6 *Ibid.,* 13.

gime might be willing to take relatively cost-free, cosmetic steps to improve its image in the face of international disfavor, it is unlikely to institute costly structural changes and substantive improvements in human rights.

Cardenas argues that international pressure in the Southern Cone produced significant effects only after the given regime had eliminated its real or perceived domestic security threats (83). As long as these forms of resistance subsisted, the benefits of internal repression were more likely to outweigh the costs of human rights criticism (83). Such was the case in Chile, for example. Although violations decreased following the suppression of internal armed resistance in 1976, further violations occurred after renewed internal violence by left-wing groups in 1979, notwithstanding external pressure (78–79). Likewise, in Argentina, violations declined precipitously only when internal armed groups were no longer active, and the government could no longer justify its prior levels of repression (82).

In Cardenas' words, the evidence "casts doubt on the extent to which state sovereignty both has changed and is likely to change dramatically as a result of human rights norms. . . . Quantitative and qualitative analyses suggest that the dynamics pushing and pulling states to respond to human rights pressure in seemingly contradictory ways have remained remarkably consistent over time" (131–132).

Wright discusses the types of correlation cited by Cardenas in a similar manner. He observes, for instance, that despite foreign pressure, Pinochet probably would not have dissolved the DINA—his regime's infamous secret police, responsible for countless acts of abduction, torture, and murder—had it not already essentially "accomplished its mission" (79). Even after dissolving the DINA formally, Pinochet merely replaced it with a new intelligence institution that was a "virtual replica" of the old one, bestowing a new name on it to give the appearance of a genuine overhaul (79). According to Wright, the lesson that the Argentine dictatorship learned from Chile about silencing criticism was to hide violations by "disappearing" its enemies, not to adopt less repressive measures (108). Turning to a more contemporary example, Wright notes that Colombia, which is facing an "intensified guerrilla war and drug-driven violence," is the only country that has increased its level of repression considerably since 1990 (32). The state of affairs in Colombia confirms Cardenas' hypothesis that so long as in-

ternal security threats persist, international human rights bodies wield relatively little influence beyond fostering cosmetic measures.

Turning to the post-transitional era, Wright's study demonstrates, explicitly and implicitly, that attempts to hold gross violators responsible in both Chile and Argentina achieved radically different results in different periods because of various domestic factors. Wright shows that despite public support in favor of accountability, a few threatening acts by leftist groups in Chile (including a high-profile assassination) were able to blunt the impact of a damning human rights report, largely removing the theme of human rights from public discourse (191). Similar events (including an attack on an army base) undercut public support for human rights accountability in Argentina (156). At first glance, Pinochet's 1998 arrest in London and the subsequent resurgence of efforts toward accountability might appear to support the more optimistic side of Wright's thesis: The arrest of a former head of state, unimaginable during the worst years of abuse in Chile and Argentina, may well seem to be a clear indication of a new global human rights consensus, inaugurating Roht-Arriaza's "age of human rights."

Despite Pinochet's arrest, however, the events mentioned above show that the power of the international human rights community to influence accountability in Chile and Argentina has been far from a linear progression from modest beginnings to large-scale success. Furthermore, even the less than perfect results in Chile and Argentina were due to unprecedented levels of pressure: As Wright puts it, Chile and Argentina had developed "the largest, most diverse, and most vigorous and persistent human rights movements in Latin America" (xiii). In this light, it seems less likely that the international human rights framework has reached a "stage of enforcement" in which future human rights violators in other regions would feel deterred from committing acts of violence and repression, particularly in countries that lack well-developed domestic human rights movements.

HUMAN RIGHTS ENFORCEMENT IN THE CURRENT GLOBAL CONTEXT

Although international pressure and the (slim) possibility of prosecution are now part of the calculus with which officials must reckon when deciding how to govern (or whether to travel abroad and risk arrest under a universal jurisdiction statute), the

main forces that drive states to comply with or deviate from international human rights norms are still overwhelmingly domestic. These forces—which include political opposition, organized crime, and real or perceived terrorist threats—have an immediacy that the distant possibility of later prosecution for human rights crimes does not. Although the relevant international legal framework has improved dramatically during the past three decades, international human rights trials have proven to be remarkably rare given the intensity and frequency of abuse, weakening any putative deterrent effects of prosecution. In real time, mass slaughter occurs in Darfur, while the ICC investigates, indicts, and prosecutes a handful of war criminals. In the 1990s, the ICT for the former Yugoslavia administered justice at a glacial pace while military forces and police committed wholesale massacres in the Balkans. At best, the possibility of prosecution remains just that for the vast majority of the world's human rights violators—a possibility, and a remote one.

Many of the political dynamics that allowed Latin American dictatorships to ignore international human rights pressure are as potent as ever. For instance, Wright notes that despite "a steady stream of negative reports and resolutions by both intergovernmental agencies and NGOs. . . . [t]he unflagging economic and diplomatic support" of the United States under President Nixon and President Ford helped Pinochet to defy international pressure without severe consequences (77). Today, the United States' support of allies in the "war on terror" regardless of their record on human rights raises similar concerns. Witness, for instance, the mass dismissals and detentions of members of the judiciary, lawyers, and human rights defenders in Pakistan during a "state of emergency" that involved the suspension of constitutional guarantees. Although the Bush administration (which has provided Pakistan with billions of dollars in military aid since 2001) expressed formal disagreement with President Musharraf's political crackdown, the United States affirmed its continuing substantive support of Pakistan, publicly proclaiming Musharraf to be an "indispensable" ally in the war on terror and "partnership with Pakistan . . . [to be] the only option."[7]

7 Human Rights First, *Save Pakistan's Courts and Constitution,* Nov. 21, 2007, available at http://humanrightsfirst.com/defenders/alert112107_rice.htm; *"U.S. official: Pakistan's Mush-*

An indication of the central role that domestic and political factors (as opposed to international norms) play in human rights accountability is the significant difference between how the Pinochet affair affected Argentina and Chile and how it affected other countries, such as Guatemala. As Roht-Arriaza noted, Pinochet's arrest may have revitalized efforts to prosecute rights violators in Chile and Argentina but not in Guatemala. This discrepancy is certainly not attributable to differing levels of abuse. Indeed, by all credible accounts, the levels in Guatemala were as high as, or higher than, those elsewhere in Latin America. Wright characterizes the slaughter of more than 200,000 people in Guatemala, primarily Mayan, as genocide (31).

Nor can the difference in Guatemala's reaction to Pinochet's arrest be associated with its failure to engage universal jurisdiction. Although Guatemalan activists encountered delays in filing suit in foreign jurisdictions (Spanish courts failed to authorize the necessary jurisdiction over Guatemalan atrocities until 2005), external investigations and prosecutions of Guatemalans, in theory, should have provoked domestic reactions similar to those in the Southern Cone. Instead, Guatemalans elected General Efraín Ríos Montt, their former dictator, to Congress. His party currently controls the Guatemalan legislature's Human Rights Commission, despite an outstanding Spanish warrant for Ríos Montt's arrest, charging him with, among other things, genocide.[8] The most likely reasons for the differing impact of foreign prosecutions on Guatemala (as compared to Argentina and Chile) lie in the nature of its domestic political conditions. Wright's study might have produced more generally applicable conclusions about how domestic human rights practices, accountability, and international forces are related had he compared states with more diverse experiences than those of Argentina and Chile, neighbors in the Southern Cone.[9]

Wright's *State Terrorism in Latin America* offers a detailed, compelling, and highly useful account of the Chilean and Argentine mili-

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arraf 'indispensable' ally," Associated Press, 7 Nov. 2007, available at http://www.cnn.com/2007/POLITICS/11/07/us.pakistan.ap/.

8 Ana Lucía Blas, "Reparten 45 comisiones de trabajo en Congreso," *Prensa Libre*, 18 Jan. 2008, available at http://www.prensalibre.com/pl/2008/enero/18/214922.html.

9 Although Wright recognizes that state repression and its legacy in Argentina and Chile were not typical of Latin America as a whole from 1970 to 1990 (xii), he asserts, "Despite the

tary dictatorships; it has value for novices and experts alike. However, practitioners seeking lessons relevant to their work in the human rights field will likely find Wright's ultimate assessment of the international system's power to deter violations or punish violators overly optimistic. By all indications, a world order based on "effective deterrents" to gross human rights violations is a distant vision at best, a mirage at worst.

Cardenas' *Conflict and Compliance* demonstrates the limited potential of international mechanisms to trigger advances in human rights. Her analysis of the impact of international pressure on rights-abusing states provides a sober, though accurate, guide for those who would design human rights strategies based on recent history.

As Wright makes clear in his treatment of the dictatorships in the Southern Cone, the past three decades have seen the international community reach a greater consensus about human rights. Indeed, the language of human rights has become the dominant discourse of morality in international affairs, as well as in the domestic politics of many states. The chances of violators facing prosecution abroad, though slight, have increased. Nevertheless, advocacy openings created by domestic political factors and used strategically by local human rights groups (sometimes in cooperation with international organizations) continue to serve as the primary cause of change within individual states. Wright's analysis of how the domestic human rights movements in Argentina and Chile acquired political strength becomes all the more relevant considering the lack of a fully empowered international presence and constitutes his book's greatest contribution.

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variations from country to country, the Argentine and Chilean cases illuminate the essential elements of Latin America's human rights crisis" (xiii). Analyses of Argentina and Chile alone, however, do not necessarily allow for an appreciation of the conditions under which international pressures are likely to lead to increased accountability for human rights abuses in other countries.

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RESUMEN

Este artículo sostiene que el esfuerzo por expandir la justiciabilidad de los derechos económicos, sociales y culturales (DESC) ante tribunales internacionales no siempre puede ser la vía más adecuada para mejorar el respeto efectivo de estos derechos. En el sistema interamericano, según los autores, los abogados de derechos humanos lograrán más avances en materia de justicia social y de DESC cuando utilicen el litigio internacional como una herramienta subsidiaria para apoyar esfuerzos de incidencia sostenidos por movimientos sociales locales, una función que a veces puede requerir plantear violaciones de DESC con la perspectiva de violaciones a derechos civiles y políticos.

Original en inglés. Traducido por Andrea Pochack.

PALAVRAS CLAVES

Sistema Interamericano – DESC- Justiciabilidad – Movimientos sociales- Litigio estratégico

LA FUNCIÓN DEL LITIGIO INTERAMERICANO EN LA PROMOCIÓN DE LA JUSTICIA SOCIAL

James L. Cavallaro y Stephanie Erin Brewer

Durante dos décadas los abogados de derechos humanos han intentado lograr avances en el goce de los derechos económicos, sociales y culturales (DESC) procurando alcanzar la justiciabilidad de estos derechos ante tribunales locales y organismos internacionales de derechos humanos. Sin embargo, en el afán de hacer justiciables estos derechos, el movimiento de derechos humanos ha fallado en considerar debidamente si la ampliación de la capacidad de los tribunales en adoptar decisiones sobre DESC es siempre y *per se*, la mejor vía para el respeto de derechos y el desarrollo efectivo de la justicia social. Nosotros afirmamos que la defensa de la justiciabilidad de los DESC como un fin en sí mismo no interpreta de manera adecuada la naturaleza instrumental del litigio en la promoción de los derechos humanos.

Así, en ciertos contextos, las estrategias más exitosas para promover la justicia social a través del litigio, no necesariamente enfatizarán el hacer justiciables a los DESC. Por el contrario, los abogados de derechos humanos lograrán avances en estos derechos en la medida que recurran al litigio internacional como una herramienta subsidiaria, que apoye los esfuerzos locales llevados a cabo por movimientos sociales; un papel que puede requerir litigar estratégicamente los reclamos de DESC desde la perspectiva de violaciones a derechos civiles y políticos. Con frecuencia es éste el caso, según nuestra opinión, del litigio ante la Corte Interamericana de Derechos Humanos.[1]

Ver las notas del texto a partir de la página 95.

Introducción

En un trabajo anterior publicado en el *Hastings Law Journal*,[2] uno de los autores de este documento, junto con Emily Schaffer, anticipó cuál consideramos el camino más inteligente para aquellos abogados que buscan promover los DESC a través del litigio interamericano, específicamente el litigio ante la Corte. Ese texto, basado en la experiencia de dos décadas de trabajo del autor con defensores de derechos y movimientos de justicia social en América Latina, combinada con la práctica de litigar sobre variadas cuestiones ante el sistema interamericano, desafía a cierta doctrina que promueve ampliar la justiciabilidad de los DESC. En particular, el trabajo cuestiona la teoría de alegar violaciones directas del artículo 26 de la Convención Americana (referido a la progresiva implementación de los DESC) —en adelante, artículo 26—. Aquel artículo sostiene que, dado el desinterés de la Corte Interamericana en reconocer violaciones del artículo 26, todo litigio que reclame directamente violaciones de esta norma, no servirá ni para convencer a la Corte ni, menos aún, para lograr que los Estados la cumplan. También establecemos una gama de alternativas que los litigantes pueden indagar para promover la justicia social a través del uso del sistema interamericano. Éstas incluyen, por ejemplo, invocar ante la Comisión los DESC protegidos por la Declaración Americana. Ante la Corte, hacemos hincapié en estrategias de litigio que focalicen los elementos de DESC en derechos civiles y políticos, que construyan casos en términos del principio de no discriminación, o que invoquen aquellos derechos económicos y sociales, con claro acceso a la Corte reconocido en el Protocolo de San Salvador.[3]

En un documento publicado el año pasado en el *Journal of International Law and Politics* de la Universidad de Nueva York,[4] la abogada de derechos humanos Tara J. Melish contestó a estas argumentaciones, sosteniendo que el artículo 26 de la Convención es un camino viable en la denuncia de violaciones a los DESC con la condición de que los litigantes limiten sus reclamos a casos individuales, y que estén basados en actos propios de los Estados que violan sus deberes establecidos en la Convención. Melish considera que en tanto los abogados de derechos humanos cumplan cuidadosamente con todos los demás requisitos de admisibilidad, la Corte Interamericana podrá reconocer violaciones del artículo 26 con el mismo alcance que los clásicos reclamos de derechos civiles y políticos.[5]

Gran parte del debate entre Melish y nosotros se refiere a la viabilidad técnica —desde la perspectiva del litigante— de alegar ante la Corte directamente la violación de DESC. Al respecto, los autores del presente documento continúan albergando serias dudas sobre las perspectivas de éxito mediante este enfoque y abogan para que los litigantes del sistema tengan en mente los límites prácticos y legales del artículo 26 de la Convención al momento de plantear sus casos. Sin embargo, al evaluar esta discusión, hemos comenzado a poner más énfasis en un aspecto mucho más amplio: más que analizar cómo los litigantes pueden convencer

a la Corte en reconocer, bajo los alcances del artículo 26, la justiciabilidad de los DESC, los peticionantes deberían preguntarse a sí mismos cuál es el mejor medio para lograr el efectivo goce de los DESC. Responder a esta última cuestión, en cambio, obliga a que los abogados de derechos humanos se pregunten qué función puede y debe desempeñar un determinado caso planteado ante la Corte Interamericana a fin de lograr efectivamente la vigencia de los derechos humanos y la justicia social. Aprovecharemos esta oportunidad para precisar y reiterar cuál creemos que debe ser esta función.

Como un aspecto inicial, los activistas deben tener en cuenta el limitado acceso en términos numéricos que el sistema interamericano permite. En los últimos tres años, por ejemplo, la Corte Interamericana ha resuelto un promedio de 15 casos por año[6] —menos de un país que ha reconocido la competencia contenciosa de la Corte por año—.[7] A la luz de esta limitación del sistema para responder directamente a la inmensa mayoría de las violaciones de derechos humanos de la región, sostenemos que cualquier estrategia de litigio que no persiga producir —o al menos potenciar— efectos más allá de las víctimas concretas de la petición es ineficiente, en el mejor de los casos, y mal orientado, en el peor.

Más aún, y como se argumenta en el artículo del *Hastings*, el impacto real y efectivo de las decisiones de la Corte no ha tenido un correlato directo con los méritos de esas decisiones, sino que ha variado bastante de acuerdo con la organización de que se trate, la movilización en los medios de comunicación y las estrategias de la sociedad civil.[8] Como consecuencia de este contexto más complejo, convocamos a los peticionarios a promover la justicia social a través de un litigio bien planteado que desempeñe un papel complementario, de sostenimiento a esfuerzos de incidencia más amplios de los movimientos sociales locales y de las organizaciones de la sociedad civil. Consideramos que escuchar a los movimientos sociales y trabajar en su sostenimiento tiene consecuencias reales en el modo de concebir al litigio y en la forma de disponer de los mecanismos internacionales. Por ejemplo, los movimientos sociales locales pueden preferir que el litigio ante la Corte esté basado en derechos civiles y políticos como parte de una estrategia más amplia para avanzar sobre un derecho social determinado. Al respecto, enfatizamos la importancia estratégica de los casos que involucran violaciones al derecho a la vida.

Escuchando a los movimientos sociales y a la sociedad civil

En vez de depender del litigio como el principal medio para avanzar en una agenda determinada de derechos humanos, entendemos que los activistas de derechos humanos deben reconocer y sostener el papel clave que desempeñan los movimientos sociales, la sociedad civil y los medios de comunicación en

el desarrollo de campañas en pos de la justicia social. Muchos, si no la mayoría de los abogados de derechos humanos, ya reconocen que el litigio tiene mayor impacto cuando se da en conjunción con la incidencia a través de los movimientos sociales, la presencia en los medios y otras formas de presión local e internacional. Sin embargo, los abogados de derechos humanos a menudo asumen que el litigio debería conducir la estrategia de incidencia y que los otros elementos arriba citados deben apoyarlo. Nosotros afirmamos que lo verdadero es lo opuesto. Esto es, campañas de incidencia más amplias pueden incluir el litigio ante el sistema interamericano como algo apropiado; pero elegir el litigio internacional, como regla general, no debería imponer límites a otras formas de promover la justicia social. Las estrategias de incidencia en pos de la justicia social, no obstante, sí pueden limitar o modificar los métodos de litigio.

Bajo este punto de vista, la relación entre el litigio y las otras estrategias tendrá consecuencias reales tanto para la naturaleza de las peticiones presentadas en el sistema interamericano como para la manera en que éstas son planteadas y litigadas. En la práctica, los movimientos sociales con frecuencia están más interesados en la Corte como camino para elevar el estándar de determinada agenda que como un tribunal donde promover la justiciabilidad de los DESC.

Más aún, a la luz del acceso extremadamente limitado a la Corte en términos numéricos, estos dos objetivos suelen entrar en conflicto. La Comisión y la Corte atienden un puñado de casos por año. Por ejemplo, desde 1979, la Corte resolvió 92 casos contenciosos, y adoptó 167 sentencias; además la Corte decidió 76 pedidos de medidas provisionales, y expidió 19 opiniones consultivas.[9] Si se mide desde 1986 —año en que se elevaron los primeros casos contenciosos a la Corte— se obtiene un promedio de cuatro casos contenciosos por año. Mientras que estas cifras se han incrementado radicalmente en los años recientes, particularmente después de las reformas de 2001, la Corte se mantiene en su promedio de menos de un caso por país por año.[10] Teniendo en cuenta estos límites severos, es claro que los peticionarios deben repensar su concepción del sistema. Con tan notables límites en su acceso, el sistema no puede ser razonablemente concebido como capaz de responder a cada injusticia en la región.[11] Por el contrario, debería ser visto como una herramienta que debe ser usada para amplificar a un muy limitado número de casos. Determinar el universo de casos es una cuestión fundamental. Si es planteado de modo inteligente, el litigio ante el sistema puede brindar oportunidades para aquellos peticionarios que pretendan promover en general la justicia social. Al mismo tiempo, esto último compromete negociaciones reales. ¿Cuál debería ser el caso que un cierto año la Corte resuelva con respecto a Ecuador? ¿Uno que se refiera a promover la justiciabilidad de las protecciones contra el desalojo forzado, o uno que trate sobre el asesinato de un líder indígena

que buscaba tener el control sobre los recursos en tierras tradicionales? ¿Cuál debería ser el caso contra Brasil? ¿Aquél que trate sobre los derechos de las personas con problemas de salud mental, a través del prisma de un paciente golpeado hasta morir en un hospital psiquiátrico cerrado; o aquel otro que pretenda que la Corte reconozca uno de los reclamos del artículo 26 como el derecho a la alimentación? Sin dudas, estas preguntas no se le presentan en términos absolutos a ningún peticionario, pero sí surgen de la capacidad extremadamente limitada del sistema, y en particular de la Corte.

Si, tal como sostenemos, el objetivo principal de quienes litigan ante el sistema interamericano debería ser plantear temas ante organismos internacionales junto con otras estrategias de incidencia, entonces no debería importar si la Corte o la Comisión tratan una cuestión en particular desde la perspectiva de los derechos civiles, políticos o de los DESC. Lo que más interesa, según nuestra opinión, es saber cuáles son los temas planteados y qué otros esfuerzos forman parte de la campaña de incidencia. Si la perspectiva de los derechos civiles y políticos ofrece una mejor oportunidad para defender y promover el cambio, entonces es esta perspectiva, antes que la de los DESC, la que debería tener prioridad.

A. Trabajando con movimientos sociales en la promoción de reformas agrarias: los casos "Corumbiara" y "Eldorado dos Carajás"

Un caso que demuestra la utilidad de trabajar con movimientos sociales y litigar estratégicamente desde la perspectiva de los derechos civiles y políticos es "Corumbiara c. Brasil".[12] El caso se refiere a la violenta expulsión de más de 500 familias de una hacienda llamada Santa Elena. Para expulsar a las familias, la policía militar brasilera atacó la hacienda en un operativo nocturno sorpresa, haciendo uso excesivo de la fuerza y dejando un saldo de 11 ocupantes muertos y 53 heridos. En consecuencia, el caso presentaba muchos ángulos posibles desde donde sostener que Brasil era responsable de violaciones a los derechos humanos de los ocupantes. Por ejemplo, los abogados podrían haber planteado el caso en primer término como una violación al derecho a la vivienda. Sin embargo, los peticionarios optaron por focalizar sus argumentos en la violencia policial ejercida durante el desalojo.[13]

Para aquellos que promueven la justiciabilidad de los DESC, "Corumbiara" puede aparecer como una oportunidad perdida dado que los peticionarios enfocaron sus planteos sobre los derechos civiles y políticos antes que sobre las violaciones a los DESC.[14] En aquel momento, en Brasil, la visión de aquellos que trabajaban con los sin tierra y de los líderes de derechos humanos era bastante distinta. Definitivamente, la extrema violencia empleada por la policía, en especial después de haber tomado el control de la hacienda Santa Elena, fue

una cuestión que ayudó a fortalecer y darle proyección nacional al debate de la reforma de la tierra, en sus muchas dimensiones.

La opción de hacer hincapié en conflictos que implicaron uso excesivo de violencia fue importante para la estrategia más general sobre el derecho a la tierra. Una decisión estratégica similar fue adoptada al año siguiente cuando la policía atacó a un grupo de ocupantes ilegales sin tierra que hacían presión para lograr expropiaciones en el Estado de Pará. En ese incidente de abril de 1996 (conocido como la masacre de Eldorado dos Carajás), los ocupantes ilegales se encontraban ocupando la ruta principal que conecta el sur del Estado de Pará con la capital, Belém, cuando la policía militar abrió fuego sobre ellos y los atacó con sus propias hoces y machetes, matando a 19 e hiriendo a muchos otros.[15]

En ambos casos, la agenda de incidencia priorizó resaltar las violaciones al derecho a la vida, en un esfuerzo por movilizar a la opinión pública local e internacional contra la utilización de la violencia policial para resolver conflictos de tierras. Ésta, más que un pronunciamiento del sistema interamericano sobre desalojos forzados, fue la meta principal de la estrategia de litigio. Más aún, tal enfoque visibilizó en ese momento a la estrategia de incidencia local. El movimiento de los sin tierra de Brasil, muy probablemente el movimiento social más desarrollado de América Latina, suele diseñar e instalar una variedad de estrategias para terminar con los desalojos forzados y aportar cambios en los patrones de tenencia de tierras. Éstas incluyen presión para obtener cambios legales, acciones de litigio en Brasil y principalmente, ocupación de tierras. Debido a que este último aspecto era central en su estrategia general, reducir el riesgo de futuras masacres policiales fue vital para el movimiento de los sin tierra.

Al mismo tiempo, el diseño del litigio interamericano en términos de violaciones al derecho a la vida no impidió que los DESC jugaran un rol de importancia en la campaña más amplia de incidencia. Primero, las presentaciones ante la Comisión se focalizaron en el contexto de inequidad de fuerzas en el cual tuvieron lugar los asesinatos. Al momento de iniciar el caso Corumbiara (octubre de 1995), el de la masacre de Eldorado dos Carajás (abril de 1996), darles trámite (septiembre de 1996), y litigar ambos casos (durante los próximos años); aquellos comprometidos en la promoción de la reforma de tierras, mantuvieron los principales reclamos de derechos sociales en una variedad de foros (incluyendo los tribunales locales, el congreso brasilero, debates internacionales, etc.).

De este modo, la campaña de incidencia tuvo en cuenta el problema del desalojo forzado, así como cuestiones relativas a la distribución de la tierra, el financiamiento y crédito para la reforma de la tierra, incluso más allá del alcance de lo que podría haber sido presentado a la Comisión Interamericana.[16] Asimismo los medios, en su cobertura del caso Corumbiara, analizaron analizar el contexto más amplio de la reforma de tierras, ocupaciones ilegales, y los reclamos por título de tierras y respeto por los derechos a la vivienda.[17]

De manera muy interesante, el registro demuestra el éxito parcial de esta estrategia. Mientras que los conflictos por tierras todavía continúan dominando el Brasil rural, los incidentes con múltiples muertes ocasionadas por fuego policial a ocupantes ilegales, virtualmente cesaron después de las masacres de Corumbiara y Eldorado. En apariencia, en respuesta a esta movilización y estrategia conjunta, tras los asesinatos de 28 personas en los incidentes de Corumbiara y Eldorado ocurridos en un período de ocho meses, el número de personas asesinadas por la policía en conflictos por tierras rurales, decreció de modo radical. Durante los siguientes cuatro años, la policía asesinó en este contexto a un total de ocho civiles. Todos los conflictos excepto uno provocaron una sola víctima; la más sangrienta provocó dos[18] crímenes.[19] Una de las revistas semanales líderes en Brasil, *IstoÉ*, informó meses después de la masacre de Eldorado que el gobierno del Estado de Pará —el epicentro de los choques rurales más violentos— expresamente había ordenado a su policía militar evitar toda situación que pudiera conducir a conflictos violentos similares a los de la masacre de Eldorado.[20]

Al mismo tiempo, al haber prácticamente cesado los asesinatos múltiples cometidos por la policía en conflictos rurales, la ocupación de tierras se intensificó, dando lugar al asentamiento de cientos de miles de ocupantes. De acuerdo con los datos oficiales, en todas las estimaciones, en relación a los 25 años precedentes, el número promedio de familias asentadas por año entre 1995 y 1999 se incrementó claramente. Para algunas, el aumento registrado fue del 500 por ciento.[21] De acuerdo con el Movimiento de los Trabajadores Sin Tierra, el número de tierras ocupadas se duplicó desde 1995 hasta 1999, en comparación con los cinco años previos.[22] Cifras oficiales demuestran que desde 1995 hasta 1999 se asentaron más familias que en los 25 años anteriores a tal período.[23] Y con respecto a la cantidad de hectáreas de tierras expropiadas (desapropiación) —áreas con órdenes de redistribución con propósito de reforma de tierras— en el período 1995-1999 se expropiaron más del doble de hectáreas que en los dos períodos anteriores de cinco años.[24]

De manera notable, entre las áreas expropiadas por el gobierno federal se encontraba la hacienda Macaxeira, el foco de la ocupación de la ruta y de la respuesta policial brutal que resultó en el asesinato de 19 ocupantes ilegales en el caso de Eldorado.[25] Además, como respuesta a la indignación local e internacional con respecto a las masacres de Corumbiara y Eldorado, las autoridades federales implementaron una variedad de medidas que incluían expropiaciones expeditivas por reforma de tierras y la provisión de financiamiento adicional para asentamientos de los sin tierra.

Los casos de Corumbiara y Eldorado acentuaron la importancia de comprender que son los movimientos sociales, y no los abogados de derechos humanos, quienes deberían liderar el diseño de las estrategias de cambio social. Los abogados de derechos humanos, por supuesto, desempeñan un papel

preeminente en el litigio, aplicando las normas legales y desarrollando argumentos ante los tribunales internacionales, Pero ellos deberían hacerlo en un sentido que apoye los objetivos de aquellos directamente afectados por graves injusticias sociales, más que como modo de promover agendas jurisprudenciales particulares. El caso Corumbiara es un ejemplo entre muchos, en el cual la necesidad de los litigantes de trabajar más estrechamente con los movimientos sociales dio forma a las estrategias legales adoptadas. Este caso también señala que las estrategias de incidencia que no posicionan al sistema interamericano como centro, a menudo revelan más promesas de promoción de justicia social que las estrategias que dependen primero y principal del litigio internacional.[26]

Esta postura —en la cual el litigio internacional desempeña un papel secundario y de apoyo— es opuesta a estrategias en las cuales los litigantes dependen de un caso ante la Corte Interamericana para producir cambios sociales. Por ejemplo, en el caso de "Yean y Bosico contra República Dominicana",[27] la Corte Interamericana consideró como discriminatoria la negativa a proveer a dos niños de ascendencia haitiana, los certificados necesarios para su inscripción en la escuela. El caso tuvo lugar en un contexto social de prejuicios enraizados en contra de los individuos descendientes de haitianos; sin dudas, la decisión en "Yean y Bosico" sienta un testimonio que toma en cuenta lo impopular del tema de los derechos igualitarios para estos dominicanos.[28] A diferencia de la experiencia del movimiento de los sin tierra en Brasil, los activistas en República Dominicana se encontraron con severas dificultades para ejercer presión efectiva en la sociedad y en los medios a favor de un tratamiento igualitario de los niños de ascendencia haitiana. Como resultado, en los momentos clave de la presentación, la Corte Interamericana se convirtió en el elemento más visible de la estrategia de incidencia. No es sorprendente, entonces, que la sentencia que señaló las violaciones del caso, se haya encontrado con un fuerte rechazo en República Dominicana,[29] donde la conclusión no tuvo eco en la población y generó críticas por parte del gobierno. En general nosotros sostenemos que es poco probable que el litigio internacional en asuntos tan controversiales como éste —cuando no está bien apoyado en la agenda local— sea efectivo para producir algún cambio social.[30]

Otros casos ante la Corte se desarrollaron como parte de estrategias de incidencia más amplias. Estos casos generalmente han implicado una mayor presión sobre los Estados y un cambio efectivo. Uno de estos casos fue tratado por la Corte a mediados de 2006. El caso, Ximenes Lopes v. Brasil,[31] se refiere a un asesinato en una clínica psiquiátrica que operaba de acuerdo con un contrato con las autoridades brasileras del Estado de Ceará. Inicialmente presentado ante la Comisión por la hermana de la víctima, el caso Ximenes Lopes atrajo la atención y el apoyo de la Comisión de Derechos Humanos de la Legislatura del Estado de Ceará, una organización brasilera de derechos humanos de primer

nivel, de psiquiatras profesionales y de agentes progresistas en el gobierno brasilero, así como también de los medios. En tanto el caso fue estructurado en términos de derechos civiles y políticos, se constituyó en un importante vehículo para dejar discutir la situación general de las personas con problemas de salud mental, particularmente aquellas que se hallan en instituciones cerradas en Brasil. La discusión amparada por el litigio internacional, tuvo lugar tanto en los términos del litigio, como en los de un debate más amplio en Brasil.

Tras encontrar que la muerte de la víctima fue responsabilidad del Estado, la Comisión Interamericana recomendó que Brasil tomara las medidas necesarias para evitar la repetición de estas violaciones en el futuro. Para ese momento, los esfuerzos llevados adelante por los actores locales, incluyendo a los familiares de los pacientes, profesionales de la salud y comisiones de salud estatales y provinciales, habían puesto ya en marcha un cambio desde un modelo de salud mental de internación, a un modelo de salud mental enfocado en el cuidado del paciente externado y en el respeto por los derechos de los pacientes.[32] Este contexto de reforma doméstica permitió una discusión más amplia referida a cuestiones fundamentales de política sobre salud mental ante la Corte Interamericana en el caso "Ximenes Lopes". Por ejemplo, Brasil presentó como prueba los pasos que habían sido dados para reducir la duración del encierro de personas con problemas de salud mental y para reestructurar su programa nacional de salud mental.[33] El caso ante la Corte, a su vez, prohijó un renovado debate acerca de la política nacional de salud pública en Brasil. Asimismo, el caso "Ximenes Lopes" ilustra, entre otras cosas, cómo un problema formulado legalmente en términos de derechos civiles y políticos puede referirse a cuestiones de justicia social, incluidos los DESC.

Jurisprudencia e incidencia integrada: el diseño de casos utilizando el derecho a la vida

Como hemos enfatizado líneas arriba, el litigio en el sistema interamericano, por las limitadas características que le son inherentes, excluye a la inmensa mayoría de las víctimas de abuso de sus derechos en la región y continuará siendo así hasta que el sistema sea radicalmente reformado. Hasta tanto eso ocurra, los casos deberían ser planeados cuidadosamente y, declaramos, conjuntamente con movimientos sociales y la sociedad civil organizada. Tomamos esta oportunidad para resaltar brevemente un patrón que surge de seguir este método: para ser preciso, cuando los peticionarios son guiados por los movimientos sociales, con frecuencia habrán de priorizar las violaciones al derecho a la vida debido al valor estratégico de las peticiones que implican este derecho.

Durante muchos años, la Corte le ha reconocido al derecho a la vida un alcance cada vez más amplio, incluyéndolo en casos que conllevan violaciones

fundamentales a los DESC. En el caso Sawhoyamaxa,[34] por ejemplo, la Corte encontró al Estado de Paraguay responsable de la muerte de 19 miembros de una comunidad indígena (incluyendo 18 niños) debido a las deficiencias del Estado en proveer las condiciones adecuadas que aseguraran su bienestar.[35] Esta línea jurisprudencial abre oportunidades a muchos abogados que litigan casos de violaciones a los DESC a plantear las principales violaciones en términos del derecho a la vida. Esta perspectiva evita la estrategia más riesgosa de depender del artículo 26 de la Convención Americana, y ofrece varios antecedentes bien fundados en los que apoyarse.

Más importante aún, el nivel de incidencia de un reclamo que involucre el derecho a la vida es central para darle visibilidad a un tema en las campañas mediáticas, las organizaciones de base, y las alianzas con la sociedad civil. Las violaciones al derecho a la vida —sean en el contexto de asesinatos policiales urbanos, revueltas en prisiones, conflictos sobre la tierra, deficiencias en el tratamiento de pacientes con VIH, o fallas en la prevención de inundaciones en viviendas precarias— tienden a aportar más peso que aquellas que no amenazan la vida. Reconocer esto es parte constitutiva del trabajar con grupos de incidencia (movimientos sociales, ONG, etc.) y de tomar de ellos las propias indicaciones como litigante. Por ejemplo, si uno está escuchando a estos grupos, a menudo oirá una preferencia por centrar la atención en aquellos que han muerto en sus luchas, más que en aquellos que diariamente sufren otro tipo de abuso en sus derechos.

No es sorprendente que los movimientos sociales tiendan a valorar mucho más los sacrificios realizados por sus miembros cuyas vidas se perdieron en el transcurso de sus luchas en pos de la justicia social. Desde la perspectiva de un peticionario legal que se oriente a la búsqueda de la justicia social antes que al desarrollo jurisprudencial, tiene más sentido apoyar esta perspectiva de derechos civiles y políticos, más que luchar en contra de ella. La clave es encontrar vías para utilizar este enfoque del derecho a la vida como un avance sobre otros aspectos de las estrategias en pos de la justicia social, incluyendo los DESC.

Conclusión

Pensando en las futuras vías de litigio en el sistema interamericano, urgimos a los profesionales a evitar asumir que el incremento de la justiciabilidad de los DESC por sí sola conducirá a un progreso efectivo de la justicia social. Llamamos a los litigantes a considerar en cambio, estrategias tales como el empleo de construcciones abarcativas de derechos civiles y políticos que puedan contener a elementos de DESC o la elaboración de peticiones que involucren violaciones tanto de derechos civiles y políticos como de DESC.

Más importante aún, urgimos a los profesionales a trabajar estrechamente

con los movimientos sociales y los medios de comunicación de los países afectados. Tomando la impronta de estos grupos y reconociendo el papel subsidiario del litigio internacional en las estrategias de incidencia, los abogados de derechos humanos pueden contribuir a asegurar esos esfuerzos para disponer la maximización del potencial del sistema interamericano, a fin de avanzar no meramente en la justiciabilidad de los DESC, sino en el goce práctico de estos derechos.

NOTAS

1. Este trabajo está basado fundamentalmente en un artículo anterior, publicado el año pasado en el *Journal of Internacional Law and Politics* de la Universidad de New York (Ver CAVALLARO, J. L. y SCHAFFER, E., "Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change" [Réplica: Justicia antes que Justiciabilidad: Litigio interamericano y cambio social], New York University, *Journal of International Law and Politics*, New York, v. 39, 2006, p. 345).

2. CAVALLARO, James L. y SCHAFFER, Emily J., "Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas" [Menos es más: Repensando el litigio internacional de los derechos económicos y sociales en las Américas], *Hastings Law Journal*, v. 56, 2004, p. 217. En adelante, "Menos es más" o "artículo del *Hastings*".

3. El Protocolo de San Salvador es el tratado interamericano que trata de manera específica sobre los DESC. Explícitamente reconoce el mecanismo de peticiones al sistema interamericano para reclamar por el derecho a la educación, protegido en el artículo 13, y para determinados derechos laborales, establecidos en el inciso a del artículo 8 (Protocolo Adicional a la Convención Americana sobre Derechos Humanos en materia de Derechos Económicos, Sociales y Culturales, "Protocolo de San Salvador", OEA/ser L./V./II 82, doc. 6 rev.1 (1992)).

4. MELISH, Tara J., "Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas" [Repensando la tesis de "Menos es Más": el litigio internacional de los DESC en las Américas], *New York University Journal of International Law and Politics*, v. 39, 2006, p. 171.

5. Ver ibidem, p. 205, donde expresa que "en el sistema interamericano, el litigio directo de los DESC, no presenta mayores problemas de justiciabilidad o de legitimidad que lo que ocurre con el litigio clásico de derechos civiles y políticos".

6. Corte Interamericana de Derechos Humanos, Jurisprudencia, disponible en <http://www.corteidh.or.cr/>, última visita realizada el 29 de septiembre de 2007.

7. Más de 20 Estados han reconocido hasta el momento la competencia contenciosa de la Corte Interamericana. Ver estado de ratificaciones de la Convención Americana sobre Derechos Humanos ("Pacto de San José de Costa Rica"), en http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>. Última visita realizada el 29 de septiembre de 2007.

8. Ver CAVALLARO y SCHAFFER, "Menos es más", *supra* nota 2, ps. 240 y 251.

9. Corte Interamericana de Derechos Humanos, Jurisprudencia, disponible en <http://www.corteidh.or.cr/>, última visita realizada el 7 de noviembre de 2007.

10. Idem.

11. No podemos desarrollar lo suficiente este punto. Nuestro análisis de las estrategias del litigio es enteramente coyuntural. Si el sistema interamericano fuera expandido y provisto de mayores recursos y de más apoyo estatal, estaríamos de acuerdo en todo tipo de litigio. Sin embargo, dado el muy, pero muy reducido número de casos que pueden llegar a la Corte, recomendamos tener mucho cuidado al seleccionar los casos a presentar.

12. Comisión Interamericana de Derechos Humanos (CIDH), "Masacre de Corumbiara", Petición Nº 11.556, Informe Nº 32/04, disponible en http://www.cidh.org/annualrep/2004eng/Brazil.11556eng.htm.>. Última visita realizada el 28 de febrero de 2008.

13. James L. Cavallaro, en esa época director de CEJIL/Brasil y director de la oficina en Brasil de Human Rights Watch, fue uno de los muchos peticionarios de los casos "Corumbiara" y "Eldorado dos Carajás", analizados a continuación.

14. En este sentido, en su crítica del artículo del *Hastings*, Tara Melish argumenta que los peticionarios de la masacre de Corumbiara se equivocaron en no plantear el caso principalmente en términos violaciones a los DESC (MELISH, *supra* nota 4, ps. 315 a 323).

15. CIDH, "El Dorado dos Carajás", Petición Nº 11.820, Admisibilidad, Informe Nº 4/03, disponible en <http://www.cidh.org/annualrep/2003eng/Brasil.11820.htm. Visitado por última vez el 28 de febrero de 2008.

16. OSAVA, Mario, "Brazil: Fear of Social Unrest Revives Land Reform" [Brasil: El temor a la turbulencia social revive la reforma de la tierra], IPS – INTER PRESS SERVICE, Río de Janeiro, 28 de septiembre de 1995; ver también "Corumbiara: Deadly Eviction" [Corumbiara: Desalojo mortal], *TIME*, v. 146, Nº 9, 28 de agosto de 1995, p. 8; "Land Question Develops into Crisis: Military Fear Conflicts May Lead to Guerrilla Violence" [La cuestión de la tierra deviene en crisis: los militares temen que los conflictos puedan conducir a violencia de guerrilla], *Latin American Weekly Report*, Londres, 1995, ps. 447-48.

17. OSAVA, M., op. cit.; "Corumbiara: Deadly Eviction", op. cit.; "Eleven Die in Land Conflict: Lula Claims Cardoso Has No Interest in Agrarian Reform" [Once muertos en conflicto de tierras: Lula denuncia que Cardoso no tiene ningún interés en la reforma agraria], *Latin American Weekly Report*, London, 1995, ps. 374-75; SCHEMO, D. J., "Brazilian Squatters Fall in Deadly Police Raid" [Ocupantes ilegales brasileros abatidos en raid policial mortal], N.Y. TIMES, 19 de septiembre de 1995, p. A1.

18. Es posible interpretar esta figura como triple. De acuerdo con los datos de la CPT, la policía militar y hombres armados asesinaron a dos civiles el 2 de marzo de 2001 en la municipalidad de Confresa, Estado de Mato Grosso. Dos días más tarde, asesinaron a otro civil en la misma municipalidad. No está claro por qué han considerado a éstos como conflictos separados (ver Comisión Pastoral de la Tierra, "Conflitos no Campo: Brasil 1997, 1998". Después de 2001, la CPT dejó de incluir información sobre la identidad de los sospechosos de asesinato).

19. No obstante, y a pesar de la reducción del número de ocupantes ilegales de tierras y manifestantes asesinados por la policía después de Corumbiara y Eldorado dos Carajás, agrupaciones de derechos

humanos han documentado un incremento de otras formas de represión. Por ejemplo, de acuerdo con el Movimiento de los Sin Terra (MST), las detenciones de campesinos sin tierras aumentaron mucho en los años posteriores a 1996, sugiriendo un desplazamiento de las técnicas de represión y destacando la incesante necesidad de incidencia relacionada a derechos civiles y políticos que permitan al movimiento de los sin tierra continuar con su puja por la reforma de la tierra (ver Movimiento de Trabajadores Rurales sin Tierra, "Prisiones 1989 a 2003", disponible en http://www.mst.org.br/mst/pagina.php?cd=1501>. Última visita realizada el 28 de febrero de 2008).

20. Según IstoÉ, "el gobierno de Pará, tras la masacre de Eldorado dos Carajás, ordenó a la policía militar no involucrarse en ninguna situación que pudiera derivar en uma confrontación" (el original en portugués dice: "*O governo do Pará, após o massacre de Eldorado do[s] Carajás, determinou ao comando da Polícia Militar paraense que não se envolva em nenhuma situação que possa resultar em confronto*"); ver CHIMANOVITCH M., "Tensão permanente: Relatórios reservados informam que os sem-terra pretendem crier versão nacional de Chipas no Pará" [Tensión permanente: fuentes reservadas informan que los sin tierra pretenden crear la versión nacional de Chiapas en el estado de Pará], *IstoÈ*, 7 de agosto de 1996, disponible en <http://www.zaz.com.br/istoe/politica/140112.htm>. Última visita realizada el 28 de febrero de 2008. En adelante, "Tensión permanente".

21. Según el gobierno, se asentaron un promedio de 11.870 familias por año desde 1970 hasta 1984. Esa cifra se incrementó levemente a 15.013 durante los diez años subsiguientes. Desde 1995 hasta 1999, el número promedio de familias asentadas cada año, de acuerdo con informes oficiales, trepó a 74.644 (ver Instituto Nacional de Colonização e Reforma Agrária, "Relatório de Atividades INCRA 30 Anos" [Informe de actividades: INCRA 30 años], disponible en <http://www.incra.gov.br/arquivos/0173500477.pdf>. Última visita realizada el 28 de febrero de 2008 (en adelante, "Informe de actividades). Diferentes informes de INCRA proveen estadísticas algo contradictorias, aunque todos afirman que los asentamientos han aumentado desde 1995 a 1999. Otro informe de INCRA publicado poco tiempo después, con una retrospectiva de 30 años, asegura que desde 1964 —año en que se aprobó el Estatuto de la Tiera— hasta 1995 se asentaron sólo 218.000 familias. Luego, entre 1995 y 1999, se asentaron 372.866 (Ver Instituto Nacional de Colonização e Reforma Agrária, "O Futuro Nasce da Terra" [El futuro nace de la tierra], disponible en <http://www.incra.gov.br/arquivos/0173500477.pdf>. Última visita realizada el 28 de febrero de 2008. En adelante, "El futuro nace de la tierra").

22. Movimento dos Trabalhadores Rurais Sem Terra, "Acampamentos – Total dos Acampamentos, 1990-2001", disponible en <http://www.mst.org.br/mst/pagina.php?cd=897>. Última visita realizada el 28 de febrero de 2008.

23. En su retrospectiva de treinta años, el Instituto Nacional de Colonización y Reforma Agraria (INCRA) informó que mientras 316.327 familias se afincaron desde 1970 hasta 1995, en los cinco años que siguieron, un total de 373.220 familias hicieron lo propio (ver Informe de actividades, *supra* nota 22).

24. Según el gobierno, desde 1985 hasta 1989 fueron expropiadas 4.191.147 hectáreas, descendiendo a 3.858.828 desde 1990 hasta 1994, antes de dar un salto a 8.785.114 hectáreas desde 1995 hasta 1999 (ver "El futuro nace de la tierra", *supra* nota 22).

25. Ver "Tensión permanente", *supra* nota 20.

26. Como se demostrara en "Menos es más" a través de la evaluación de muchos casos de estudio, las

instancias en las cuales el litigio ante el sistema estuvo desprovisto de activismo local, fue menos apto de producir cambios significativos (ver CAVALLARO y SCHAFFER, *supra* nota 2, ps. 240 a 251).

27. Corte IDH, "Caso Yean y Bosico contra República Dominicana", Ser. C, Nº 130, 8 de septiembre de 2005.

28. Idem, p. 85-86.

29. Ver PINA, Diógenes, "Acatamiento Parcial a la Corte Interamericana", *Inter Press Service News Agency*, 23 de marzo de 2007, disponible en <http://ipsnoticias.net/interna.asp?idnews=40469>. Última visita realizada el 28 de febrero de 2008 (citando un documento editado por la Secretaría Dominicana de Relaciones Exteriores en el cual el gobierno desafía tanto el proceso como el resultado del caso en la Corte); DÍAZ, J. B., "¿Haitianos, Dominicanos o Domínicohaitianos?", *El Diario Hoy*, San Salvador, 16 de octubre de 2005, disponible en <http://www.clavedigital.com.do/Portada/Articulo.asp?Id_Articulo=6231>. Última visita realizada el 28 de febrero de 2008 (que informa que la mayoría de dominicanos que conocieron la sentencia tuvieron una fuerte reacción negativa); "Consideran política, excluyente y discriminatoria, la sentencia de la Suprema Corte de Justicia Dominicana", *AlterPresse*, Puerto Príncipe, 19 de diciembre de 2005, disponible en <http://www.alterpresse.org/spip.php?article3809>. Última visita realizada el 28 de febrero de 2008 (que da cuenta de una decisión de la Corte Suprema de la República Dominicana, del 14 de diciembre de 2005, que contradice la decisión de la Corte Interamericana en el caso "Yean y Bosico", en cuanto a que a los niños nacidos en República Dominicana no se les puede negar la nacionalidad dominicana en razón del status migratorio de sus padres).

30. Para ser claros, no sostenemos una regla absoluta en contra del uso del litigio como una estrategia central de incidencia. En cierta medida sugerimos que los peticionarios evalúen el contexto político en el cual operan y traten de alcanzar a otros actores y movimientos sociales en el diseño de movilización y estrategias de litigio. Bien pueden ser instancias en las cuales no haya otra movilización que la presión internacional, y por extensión, el litigio internacional sea viable. Sin embargo, litigar un caso ante la Corte Interamericana en esas circunstancias, debería ser el resultado de un proceso deliberativo, más que una reacción instintiva y legal frente a la violación del derecho de los derechos humanos.

31. Corte IDH, "Ximenes Lopes contra Brazil", Ser. C, Nº 149, 4 de julio de 2006.

32. Ximenes Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149 (4 de Julio de 2006).

33. Ver *idem*, p. 46.2 (que sintetiza la evidencia documental referida a los esfuerzos realizados por reducir el confinamiento de los pacientes de salud mental y "humanizar el cuidado del sistema de" salud mental con la participación de pacientes, sus familiares y profesionales de la salud).

34. Uno de los testigos que presentó Brasil fue Pedro Gabriel Godinho Delgado, coordinador nacional del Programa de Salud Mental del Ministerio de Salud. El testimonio de Godinho Delgado se centró en las medidas adoptadas por el Estado para aumentar el cuidado de pacientes externados, en oposición al encierro, así como las medidas implementadas para promover y respetar los derechos humanos en el sistema de salud mental (ver idem, p. 47.3.b).

35. Corte IDH, "Caso Comunidad indígena Sawhoyamaxa contra Paraguay", Ser. C, Nº 146, 29 de marzo de 2006.

36. Ver idem, ps. 151, 153, 178.

ABSTRACT

This article contends that efforts to expand the justiciability of economic, social, and cultural (ESC) rights before supranational tribunals may not always be the best way to increase respect for these rights on the ground. In the Inter-American System, the authors maintain that human rights lawyers will best advance social justice and ESC rights when they use supranational litigation as a subsidiary tool to support advocacy efforts led by domestic social movements, a role that may often entail litigating ESC claims strategically within the framework of civil and political violations.

KEYWORDS

Inter-American – ESC rights – Justiciability – Social movements – Strategic litigation

RESUMO

Esse artigo defende que os esforços para expandir a justiciabilidade dos direitos econômicos, sociais e culturais (ESC), perante tribunais supranacionais, possivelmente não venha a ser sempre a melhor forma para aumentar concretamente o respeito a esses direitos. No Sistema Interamericano, os autores deste artigo afirmam que os advogados de direitos humanos serão mais capazes de promover a justiça social e os direitos ESC quando usarem a litigância supranacional como uma ferramenta subsidiária, destinada a apoiar esforços de mobilização já promovidos por movimentos sociais internos. Esse papel coadjuvante pode com freqüência implicar, como uma medida estratégica, a litigância de casos relacionados a direitos ESC dentro da estrutura própria das violações a direitos civis e políticos.

PALAVRAS-CHAVE

Sistema Interamericano – Direitos ESC – Justiciabilidade – Movimentos sociais – Litigância estratégica

6

The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond

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I INTRODUCTION

INCREASINGLY, TRUTH COMMISSIONS (TRCs)[1] have taken centre-stage in transitional justice processes. Over the past 20 years, some two dozen such commissions have been created in states undergoing transitions from authoritarian or communist regimes to more democratic forms of government. These commissions have demonstrated remarkable adaptability along a number of dimensions. Thus, the commissions have varied as to the scope of abuses addressed[2]; the number, gender and affiliation of commissioners[3]; whether to include mechanisms to pardon violators in exchange for confession[4]; whether to name the names

* The authors wish to thank Dr. Siri Gloppen for her insightful comments on the draft, Patrick McNally and Habib Rahiab for research assistance, and the participants in the Harvard Human Rights Program colloquium series for their comments on an earlier version of this chapter.

[1] The initials 'TRC' come from the term 'Truth and Reconciliation Commission'. Not all such commissions include the term 'reconciliation' in their titles. Nonetheless, in the interest of simplicity, we use the term 'TRC' to refer to the class of commissions.

[2] The commissions established in Argentina and Chile focused on forced disappearances; later commissions have focused on other grave civil and political rights abuses. More recent commissions, such as the one created in East Timor, have included—albeit in a limited fashion—violations of economic, social, and cultural rights.

[3] For instance, Argentina's National Commission on the Disappeared had 16 members, while Chile's National Commission for Truth and Reconciliation had about half that number. Likewise, some TRCs have been chaired by non-political personalities, such as writers, while others have had seasoned politicians and congressmen at the helm. Yet other TRCs have included religious leaders as members, such as priests and rabbis.

[4] The South African Truth Commission pioneered this process, granting amnesty to persons who made full disclosure of all the relevant facts relating to acts associated with a political objective. See Promotion of National Unity and Reconciliation Act, 1995, available online at http://www.fas.org/irp/world/rsa/act95_034.htm.

of individuals responsible for abuse; whether to provide compensation and the measure of such compensation[5]; duration; and the scope of investigative powers.

Yet these truth commissions, despite their heterogeneity, have consistently adopted a set of parameters established by the conventional understanding of the scope of human rights law and practice at the time of the creation of the first such bodies in Latin America. These constraints led to a focus on gross violations of civil and political rights, especially forced disappearances, execution, and torture.[6] Because of this reliance on the human rights framework, we argue, state-sponsored TRCs have failed to include in their mandates economic crimes[7] and corruption[8]—issues only recently embraced by mainstream human rights organisations.[9] This is so, we contend, despite a marked grassroots condemnation of corruption and economic crimes and despite popular support for efforts to hold leaders accountable for economic crimes and corruption both in Latin America and Africa.[10] Apart from habit and the suspect notion that truth commissions should focus on human rights abuses (and then, only particular

[5] In Brazil, for example, Law 9.140/95 created a commission with limited investigatory powers but authorised relatively high levels of compensation—in excess of US$100,000 per victim of forced disappearance or political execution.

[6] The mandate of most TRCs in Latin America during the 1980s and 1990s reflects these priorities; TRCs (in chronological order) whose mandates (see Part III below) were linked to the human rights agenda are: Argentina, Uruguay, Chile, El Salvador, and Guatemala.

[7] By economic crimes we refer to acts by authorities in violation of generally applicable criminal law, such as large-scale embezzlement, fraud, and tax crimes such as evasion. However, it must be noted that specific definitions of what constitutes economic criminal behaviour vary between and among societies. In our analysis, we use a relatively broad definition such that the term encompasses any behaviour deemed to involve economic crime by the particular truth commission considered.

[8] Definitions of corruption vary dramatically. For a comprehensive analysis of the conceptualisation of corruption, see R Williams, 'New Concepts for Old' (1999) 20 *Third World Quarterly* 503. The definitions of corruption have shifted over time from the 'public office' view (eg S Nye, 'Corruption: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review* 417), to the economic perspective (eg S Rose-Ackerman, *Corruption* (New Haven, Academic Press, 1978)), to agency theory (eg E Banfield, 'Corruption as a Feature of Government Organization' (1975) 8 *Journal of Law and Economics* 587). In this chapter, we draw on the 'public office' definition of corruption, which underscores the distinction between the public and the private spheres. We are interested in acts of corruption such as appropriation of public resources by military officials during dictatorships, especially high-ranking officials, even if they occur in collusion with private individuals and groups close to the government structure.

[9] Early TRCs operated in an environment that failed to prioritise economic, social, and cultural rights, which were marginal to mainstream human rights practice for much of the 1980s and early and mid-1990s. The idea that corruption and embezzlement might be related to human rights was even farther afield. It is thus understandable (though not necessarily defensible, even in hindsight) that economic crimes ordinarily would have been left off the transitional justice agenda.

[10] A recent civil society report on corruption during apartheid in Africa underscores the extent of corruption during the apartheid regime, the relevance given by members of civil society to the issue, and the negative effects of leaving the investigation of economic malfeasance aside: See H Van Vuuren, 'Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit In South Africa, 1976–1994: A Report Prepared by Civil Society at the Request of the Second National Anti-Corruption Summit' (2006), available online at http://www.ipocafrica.org/pubs/reports/apartheidgrandc.pdf (visited 25 July 2006).

abuses), there is no convincing a priori reason why economic crimes should be excluded from the ambit of transitional truth commissions.

Addressing corruption and economic crimes at the transition and, later, during democratic consolidation, is essential. We draw on recent political science literature, first to underscore the significant impact that corruption and economic crimes have on democratic transition and consolidation in Latin America and beyond, and secondly, to support the argument that the inclusion of corruption and economic crimes during the transition and, specifically, within truth commissions, is vital for the realisation of democratic objectives.

The chapter proceeds in three sections. Part II sets out the core of acculturation theory as a framework for understanding how 'top-down' transitional justice models have proliferated, dominating the discipline. Part III, the bulk of the chapter, starts by providing background on the creation of TRCs in Latin America, highlighting the exclusion of economic crimes and corruption from their mandates. Next, it considers the extent of corruption in authoritarian regimes in Latin America, as well as perceptions of this phenomenon. This part then addresses an issue central to the argument posed in this chapter, namely, that corruption and economic crimes are strongly rejected and condemned by the masses in Latin America. Consequently, the last section argues that, in light of this generalised, grassroots sentiment, including corruption and economic crimes in TRCs may be functional to de-legitimising authoritarian regimes and to democratic consolidation. Finally, Part IV includes a brief look at TRCs beyond Latin America, suggesting that the trends identified in Latin America have continued to shape and limit the field.

II TRUTH COMMISSIONS AND THE FRAMEWORK OF ACCULTURATION

Through an extensive body of comparative and longitudinal studies, sociology's neo-institutionalism advances the idea that the global institutional environment largely influences policy choices of nations around the world. Also dubbed the 'World Society' school, this theory posits that

> [w]orldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors ...

> The institutionalization of world models helps explain many puzzling features of contemporary national societies, such as structural isomorphism.[11]

Isomorphism, in turn, may be defined as 'structural similarity across organizations'[12] based on the adoption of standard scripts despite the existence of differences between and among contexts, differences that should result in greater variety.

Ryan Goodman and Derek Jinks apply this framework to international relations scholarship, offering an account of state behaviour based on the socialisation of global models or scripts. Goodman and Jinks argue that state behaviour in human rights, as in other areas, is highly influenced by the surrounding environment, leading actors to follow the behaviour of others through mimicry, identification, and status maximisation,[13] a collective process termed 'acculturation'.

An important feature of this analysis is the recognition that, while a broad range of states may adopt certain norms or standards as a result of the influence of acculturation and associational processes, given the differences in domestic variables such as level of development, infrastructure, and local culture, the degree of implementation of these standards will vary widely. Thus, one finds significant 'decoupling,' that is, divergence between adopted norms and practice, a result to be expected when norms are imported.[14]

We posit here that top-down, transitional justice schemes based on international models have been adopted by states largely as a result of the process of acculturation, and not as a consequence of their suitability for context-specific needs. Thus, isomorphism and decoupling, characteristic of other aspects of state governance, are also present in transitional justice models adopted by nation-states.

As a result, the accepted range of options included in the transitional justice agenda, which has become widely adopted globally, may be insufficient because it ignores vital economic issues, specifically economic crimes and corruption.[15] As Goodman and Jinks write, when

> models [develop] universal authority and legitimacy, states follow the global scripts as members of world society despite the ineffectiveness (or even dysfunctionality) of resultant organizational forms.[16]

[11] JW Meyer, J Boli and GM Thomas, 'World Society and the Nation-State' (1997) 103 *American Journal of Sociology* 144 at 145.

[12] R Goodman and D Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621 at 647.

[13] *Ibid* at 626.

[14] Meyer, Boli and Thomas, 'World Society and the Nation-State' (n 11 above) at 154–6.

[15] For further discussion of the 'under-inclusiveness' of transitional justice mechanisms, see the contributions of Arriaza and Roht-Arriaza (ch 7); McConnachie and Morison (ch 4); and McGregor (ch 3) in this collection.

[16] Goodman and Jinks, 'How to Influence States' (n 12 above) at 652.

Transitional justice models—and the specific mechanisms that developed in connection to them—have been useful in denouncing and documenting gross violations of civil and political rights, and in allowing societies to consider and apply a range of solutions to past abuses. However, we suggest that they are insufficient because they exclude the problem of economic crimes and corruption. Applying the concept of acculturation to TRCs, we suggest that, once the model for TRCs as a vehicle for denouncing only a limited set of human rights violations developed legitimacy in world society, modifying the script to include economic crimes and corruption—and thus undoing the process of socialisation of the model—became extremely difficult.[17]

In practice, it is not difficult to identify the existence of personal and institutional links that have led to the development of this dominant script. While the first few truth commissions, such as the 1984 Argentine Commission, and the failed Bolivian commission of 1982, may have developed in relative isolation, subsequent TRCs have been the work of repeated information exchange and consultations with prior commission members and a cadre of international scholars and practitioners in the area. Thus, for example, Priscilla Hayner observes the genesis of the mandate of the truth commission in Burundi in the following terms:

> The terms of reference adopted for the commission closely followed the recommendation of the secretary general's special envoy to Burundi, Venezuelan lawyer Pedro Nikken, who had been part of the UN negotiating team in El Salvador several years earlier and had helped to draft the terms of the truth commission there. He recommended a very similar entity for Burundi.[18]

In her epilogue to her comprehensive study on truth commissions, Hayner herself notes that in the days and weeks approaching as she finished the text, she had been invited to consult on the development of commissions in Indonesia, Sierra Leone, East Timor and Cambodia. The organisation for which Hayner now works—the International Centre for Transitional Justice—has become the leading think-tank on issues of justice in transition. As such, it has been involved in the development and study of various TRCs in more than 30 countries.[19]

By no means do we suggest that this sort of international exchange should not occur, nor do we question the vital contributions that it has made to the field of transitional justice and to TRCs in particular. Quite the contrary: the free exchange of experiences, lessons learned, best and

[17] For a discussion on adopting a 'thicker' approach to transitional justice, moving away from dominant legalistic scripts, see McEvoy (ch 2) in this collection.

[18] P Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York and London, Routledge, 2002) 67.

[19] For more on the work of the International Centre for Transitional Justice, see http://www.ictj.org/en/where/overview/.

worst practices, and historical and legal precedents, provide a vital basis for enhancing the strength, efficacy, and responsiveness of truth commissions. However, we hope to begin to unwrap in a preliminary fashion the processes that have led to the creation of a TRC script that, while fertile in many areas, has excluded economic crimes from its mandate. In so doing, we hope to promote more fully the development of an environment in which, as scholar Martha Minow writes,

> the variety of circumstances and contexts for each nation, and indeed each person ... inflect and inform purposes in dealing with the past and methods that work or can even be tried.[20]

We suggest that, increasingly, the dominant script has served to limit, at least in some ways, rather than expand possibilities, and to restrict, rather than encourage, full inclusion of grassroots preferences.

Further, there is good reason to believe that the forces leading to acculturation and adoption of 'world society' norms are present or perhaps intensified in situations of transition, in which states and their agents are particularly concerned, and their attention particularly focused, on the international community and its standards of legitimacy. Recent research on peace agreements and human rights (which were found to be similar in many respects across societies)[21] as well as work on issues such as incorporation of women's suffrage (which demonstrate similarities at the moment of adoption despite significant difference in local circumstances)[22] support this conclusion.[23]

[20] M Minow, *Between Vengeance and Forgiveness* (Boston MA, Beacon Press, 1998) 4.

[21] In the field of transition from civil war to peace, a similar trend towards the development of uniform standards has taken hold. To some extent, a recent report by the International Council on Human Rights Policy recognises that, 'the expertise built up within the international community, especially at the United Nations, may have contributed to a common approach to peace-making': *Negotiating Justice? Human Rights and Peace Agreements* (Geneva, International Council on Human Rights Policy, 2006) 12.

[22] See Goodman and Jinks, 'How to Influence States' (n 12 above) at 650.

[23] An interesting counter-example involving an effort to expand the truth commission format to respond to local circumstances comes from an unlikely source. The recent truth commission established in Morocco fails to conform to a common political feature of TRCs—their formation in periods of transition. The Moroccan commission, by contrast to most other TRCs, was established by the King after a relatively limited, top-down transition. For an excellent analysis of the Moroccan commission, see P Hazan, 'Morocco: Betting on a Truth Commission' (United Institute of Peace, Special Report, 2006) available online at: http://www.usip.org/pubs/specialreports/sr165.pdf.

III WHY INCLUDE ECONOMIC CRIMES IN TRANSITIONAL JUSTICE SCHEMES? THE CONTEXT AND SOME WORKING HYPOTHESES

During the course of the 1980s and 1990s, a host of Latin American nations engaged in transitions from authoritarian to civilian, more democratic rule. While these transitions occurred across a broad range of circumstances, the TRCs implemented during the transition were strikingly similar.

We may trace the beginning of the growth and development of truth commissions in Latin America to the Sábato Commission, established in Argentina after the fall of the military dictatorship and the election of Raúl Alfonsín to the presidency.[24] While the military junta had committed a range of civil and political rights abuses (and engaged in economic crimes and corruption), the single abuse most closely associated with the dirty war imposed on Argentina was forced disappearance.[25] Not surprisingly, then, this crime, and this crime alone, became the focus of the work of the Argentine truth commission,[26] the National Commission for the Investigation of Forced Disappearances (Comisión Nacional para la Investigación Sobre la Desaparición de Personas).

In 1985, shortly after a negotiated pact brought an end to 11 years of military rule in Uruguay, the newly-formed civilian government created a commission on disappearances. As in Argentina,[27] the investigatory body's mandate limited it to the crime of disappearance, despite the broad recognition that the Uruguayan dictatorship had made *relatively little* use of this horrendous practice.[28] Likewise, Chile's TRC, created after Pinochet's loss of the 1988 referendum and the 1989 victory by Patricio Aylwin and the Concertación, focused on forced disappearances.[29]

[24] Two years before the establishment of the Sábato Commission in Argentina, a commission had been established in Bolivia by President Hernán Siles Suazo. That commission laboured from 1982 to 1984, collecting testimony on 155 disappearances that occurred between 1967 and 1982, but disbanded without producing a final report. See E Cuya, 'Las Comisiones de la Verdad en América Latina', *Dokumentations und Informationszentrum Menschenrechte in Lateinamerika Nürnberger Menschenrechtszentrum*, available online at http://www.derechos.org/koaga/iii/1/cuya.html.

[25] The implementation of a plan by which people were systematically kidnapped and assassinated resulted in as many as 30,000 disappeared individuals during the '*guerra sucia*' or dirty war.

[26] See Art 1 of Decreto Ley 187/83, creating the TRC.

[27] This was also the case in Bolivia.

[28] For the new Uruguayan leaders, following Argentina's lead would prove quite convenient: by avoiding investigation of torture, which had been practised massively in Uruguay, the transitional rulers could provide a minimal measure of accountability without provoking the wrath of the still powerful military. See, M Macedo, *Tiempos de Ida, Tiempos de Vuelta* (Montevideo, Ediciones Orbe Libros, 2002); L Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* (Chicago, University of Chicago Press, 1998); D Gil, *El Terror y la Tortura* (Montevideo, EPPAL, 1990).

[29] See Art 1 of Decreto Supremo No 355, creating the TRC.

In 1991, the United Nations brokered a peace deal to end the brutal 12-year civil war in El Salvador. The accord, negotiated over a period of three years (1989–92), included the intervention of a United Nations peace-keeping force and the establishment of a TRC. The mandate of that commission restricted it to investigating serious acts of violence only.[30] Shortly thereafter, Guatemala's protracted armed conflict also reached an end under the auspices of the United Nations, which established a peace-keeping mission, MINUGUA. Decisions about the powers and breadth of the commission were shaped by the conflicted context in which the TRC was created. In the end, the Commission focused exclusively on human rights violations and acts of violence.[31] In a similar vein, the Honduran National Commissioner for the Protection of Human Rights, Leo Valladares, also conducted an investigation into a similarly narrow set of violations that took place in the 1980s. With a familiar focus on forced disappearances, the Honduran Commission produced a report, *Los Hechos Hablan por Sí*, later translated into English by Human Rights Watch and the Centre for Justice and International Law (CEJIL).[32]

A Perception and Reality of Corruption in Recent Latin American Dictatorships

While we do not intend to provide a full account of corruption in recent Latin American dictatorships, in this section we draw upon examples from Chile, Argentina, Bolivia, Paraguay and Uruguay to illustrate and support the argument that economic crimes and corruption were common currency during military rule in Latin America, however, they have been largely ignored by truth commissions and, more generally, have received inadequate attention in post-transition Latin America.

As noted in the introduction, a dominant narrative exists in Latin America, namely, that corruption was limited during the many dictatorships throughout the region, and that it has increased with the advent of democratic rule. To some extent, this may be due to the fact that little investigation of corruption during authoritarian regimes was conducted

[30] See El Salvador: México Peace Agreement 1991 (27 April 1991) available online at http://www.usip.org/library/tc/doc/charters/tc_elsalvador.html.

[31] Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, 1994. Reproduced online at http://www.usip.org/library/pa/guatemala/guat_940623.html.

[32] See Centre for Justice and International Law (CEJIL) and Human Rights Watch, *The Facts Speak for Themselves: The Preliminary Report on Disappearances of the National Commissioner for the Protection of Human Rights in Honduras* (trans coordinator JL Cavallaro, Jr) (New York, Human Rights Watch, 1994).

during transitions.[33] As shown above, investigations of high-level corruption and economic crimes were excluded from the mandate of TRCs; this omission may have contributed to some extent to the unfortunate and largely inaccurate popular belief that Latin American dictatorships were not corrupt.[34]

Further, the omission of economic crimes and corruption from TRCs is especially striking because the vast social inequality, economic mismanagement, and abuse by elites were generally driving forces in the underlying conflicts whose resolution eventually led to the creation and implementation of transitional justice mechanisms.

Although evidence of these forms of abuse of power during authoritarian regimes is scarce—not surprisingly, for these matters were carefully concealed—some cases of serious acts of corruption involving high-ranking military officials, their family members, and economic groups to which they were linked, were denounced and reached the public. Some of them include direct embezzlement, fraud, and appropriation of assets; others concern fraudulent business agreements, especially in the process of privatisation of government enterprises.

The case of corruption in Chile under Pinochet is especially interesting because, historically, Chile has been a country with relatively limited corruption. As Patricio Orellana Vargas observes, Pinochet's dictatorship broke with this tradition (it was the '*punto de quiebre*'[35]). In other words, the dictatorship established a network of corrupt practices rarely seen before in Chile. The recently publicised case involving secret accounts at Riggs Bank in the United States is certainly the most visible.[36] However, several other forms of corruption existed that benefited Pinochet, his family, and friends.[37] Without a formal mechanism to investigate official

[33] Some studies find that an increase in corruption with new democratic regimes is more than just a perception. Montinola and Jackman find that corruption is likely to be higher in new or partially established democracies as compared to dictatorships. However, once democracies become more fully established, the level of corruption tends to decrease. See G Montinolla and R Jackman, 'Sources of Corruption: A Cross Country Study' (2002) 32 *British Journal of Political Science* 147.

[34] This narrative is not exclusive to Latin America; it also existed in South Africa: 'Public perception that a democratic South Africa is more corrupt than the apartheid regime dominated much of the public discourse for a number of years after 1994'. See Van Vuuren, 'Apartheid Grand Corruption' (n 10 above) at 12.

[35] P Orellana Vargas, 'Probidad y Corrupción en Chile' (2004) 3 *Polis Revista de la Universidad Bolivariana* 1 at 10, available online at http://redalyc.uaemex.mx/src/inicio/ArtPdfRed.jsp?iCve=30500818&iCveNum=0.

[36] A probe by the US Senate's Permanent Subcommittee on Investigations reported that from 1994 to 2002, Pinochet opened six accounts and issued several certificates of deposit while he was under house arrest in the UK and his assets were the subject of court proceedings. Deposits in Pinochet's accounts ranged from US$4 to US$8 million at a time.

[37] For several reports of corruption during the Pinochet Regime, including, inter alia, nepotism; fraud, which benefited the Pinochet family and close economic groups; illegal arms sales to Yugoslavia; undue benefits to high ranking officials; fraudulent deals in the

corruption during the Pinochet era, some individuals undertook efforts to examine abuses, often at significant personal risk.[38]

In Argentina, high-level officials, such as the Ministry of Economy under the dictatorship, José Martínez de Hoz, were also involved in corrupt affairs. Corruption took place in the form of protection to business groups that were close to the regime, as well as attacks against opposition business sectors ('desafectados'). In the case of SADECO, a cotton exports company, its owners were forced to give up export quotas when they were imprisoned.[39] On the other hand, some businesses were tightly linked to the regime:

> Business organizations such as the Coordinated Action of Free Business Institutions (ACIEL) and the Permanent Assembly of Entrepreneurial Entities (APEGE) were linked to the authoritarian regime. In many cases, key state bureaucrats during the authoritarian periods were members of these business organizations.[40]

Bolivia had a long history of authoritarian regimes. Luis García Meza, who held power from 1980 to 1982, was responsible for serious acts of corruption.

> In less than a year of de facto government, not only did he steal from the public moneys, but, from within the government, organized the most protected network of international trade of illegal drugs.[41]

Once his regime was ousted, he deposited in Citibank Argentina, on October 20 1982, US$15 million.[42]

Fraud and embezzlement were not unknown in Paraguay. During Stroessner's rule, millions of dollars were stolen through exchange hoaxes in the Central Bank, and were exported to international banks.[43] Uruguay, too, was no exception to this trend, but rather a country in which 'arbitrariness, theft, and illegal appropriation of public moneys took place at every level'.[44] Corruption took place, inter alia, in business deals like the sale of banks, privatisation of state businesses, and public works contracts.

privatisation of state enterprises; see M Brescia, *Manos Limpias: La Corrupción en las Empresas Públicas (de Todos los Chilenos)* (Santiago, Editorial Mare Nostrum, 2001) 147; B Pollack and A Matear, 'Dictatorship, Democracy, and Corruption in Chile' (1997) 25 *Crime, Law, and Social Change* 371 at 376; MA Monkeber, *El Saqueo de los Grupos Económicos al Estado Chileno* (Santiago, Ediciones B, 2001).

[38] Jorge Lavandero, who denounced some of the corruption acts described below, was beaten so severely that he nearly died. Independent periodicals that denounced corruption, like Revista Cauce, were censored or closed. See Orellana Vargas, 'Probidad y Corrupción en Chile' (n 35 above) at 15.

[39] P Miranda, *Terrorismo de Estado: Testimonio del Horror en Chile* (Santiago, Editorial Sextante, 1989).

[40] JW Freels, *El Sector Industrial en la política Nacional* (Buenos Aires, EUDEBA, 1970) 5. For more on the link between business sectors and government, see G O'Donnell, *Estado y Alianzas en la Argentina, 1956–1976* (Buenos Aires, CEDES/CLACSO, 1976) no 5; G O'Donnell, *Notas para el estudio de la burguesía local, con especial referencia a sus vinculaciones con el capital transnacional y el aparato estatal*, Estudios Sociales (Buenos Aires, CEDES, 1978) 12.

[41] P Miranda, *La Agonía del Dinero* (trans JL Cavallaro and S Albuja) (Santiago, Ediciones Sextante, 1990) 72.

[42] *Ibid.*

[43] Miranda, *La Agonía del Dinero* (n 41 above).

[44] M Carrió, *Pais Vaciado: Dictadura y Negociados* (Montevideo, Monte Sexto, 1987) at 7.

B Grassroots Attitudes on Corruption in Latin America

Throughout Latin America, at the grassroots level, public opinion strongly rejects high-scale corruption and acts of economic malfeasance during democratic regimes. To an important extent, due to high perceived levels of corruption, broad segments of public opinion in Latin America have tenuous confidence in democratic institutions. Latinobarómetro reports, for example, that in all countries in the region, the public strongly distrusts governmental institutions: for 2004, on average, only 24 per cent of the population trusted legislatures and only 32 per cent trusted the judicial system.[45] Based on data from the Transparency International Corruption Percentage Index and the World Values Survey for 1995–97, other analyses establish an important nexus between citizen perceptions of official corruption and rejection levels for incumbent leaders, finding high levels of negative correlation between perception of corruption and support for those in power.[46]

> When citizens in Latin America perceive rampant political corruption, those views translate directly into downgrading of opinion for both incumbent officials and political institutions ... Citizens perceive corruption and they connect those perceptions to their judgments of incumbent leaders and political institutions.[47]

One of the motivations for the ousting of Ecuador's President Mahuad in 2000 focused on allegations of corruption, including one charge that he had received US$3 million from a banking and corporate group. Likewise, Abdalá Bucaram was ousted because of his famously corrupt practices

[45] Latinobarómetro, 'Informe Resumen Latinobarómetro 2004', Una Década De Mediciones (Santiago De Chile, Corporación Latinobarómetro, 13 August 2004). While the figures cited are aggregates, they show a general pattern of popular preference. See http://www.latinobarometro.org/.

[46] D Canache and ME Allison, 'Perceptions of Political Corruption in Latin American Democracies' (2005) 47 *Latin American Politics and Society* 91 at 103. Indeed, through another statistical analysis, Canache and Allison first determine that 'there is a high degree of correspondence between expert judgments and the views of the person on the street' when assessing corruption in the Americas. *Ibid* at 100.

[47] *Ibid* at 106. The Latin American Public Opinion Project also reports high degrees of rejection of corrupt behaviour.

throughout governmental institutions.[48] Grassroots unrest and mobilisation were the driving forces behind the removal of these corrupt leaders.[49] In all, from the early 1990s to 2005, 'nine Latin American presidents or former presidents have faced judicial proceedings or have been dismissed on corruption charges'.[50]

Against this tendency, there is a generalised feeling in Latin America that rejection for high-level corruption did not exist for authoritarian regimes. This idea may have its roots in a history of popular tolerance or even support for authoritarianism in the region. The co-existence of an authoritarian, personalistic culture in the political sphere and poorly developed democratic institutions has been the subject of much analysis by scholars studying Latin American political culture.[51] Historically, Latin Americans are less likely to condemn an authoritarian regime if it can achieve certain goals, such as order and predictability; in fact, they have systematically supported authoritarian figures. Not only does the region have a long-standing history of *caudillismo*, or strongmen with broad popular support, but this trend has continued well into the post-transitional period of the past two decades.[52]

Voting patterns corroborate this popular support for authoritarian figures. Hugo Chávez in Venezuela, Lucio Gutiérrez in Ecuador, and Ollanta Humala in Perú are cases in point. All of them violated the constitutional order and attempted to seize power by extra-legal means.

[48] Bucaram's networks of corruption involved the administration of customs, a national-scale housing project, and fundraising programmes for underprivileged children. See M Pallares and M Cevallos, 'Comedia de los Escándalos' in D Cornejo (ed), *Que se Vaya: Crónica del Bucaramato* (Quito, EDIMPRES, 1997) available online at http://www.hoy.com.ec/libro/indice.htm.

[49] The rejection of political corruption at the local level in Latin America has also motivated the organisation of grassroots, citizen-based bodies, known as *veedurías ciudadanas*, or *contralorías ciudadanas*, which have been implemented in nearly every Latin American country. These bodies focus on controlling political corruption by overseeing processes ranging from the appointment of judges to public contracts. See, eg Ecuador's *veedurías ciudadanas*, at *¿Qué son las veedurías ciudadanas?* available online at www.comisionanticorrupcion.com/paginas/veedurias.asp?idparam=s&idsubsec=23&idsec=10&idarea=2.

[50] Canache and Allison, 'Perceptions of Political Corruption in Latin American Democracies' (n 46 above) at 94. In addition to Bucaram, Mahuad and Collor de Mello, Canache and Allison include Alan García, Carlos Salinas de Gortari, Fabián Alarcón, Ernesto Samper, Carlos Menem and Alberto Fujimori.

[51] See, eg n 57 below.

[52] G O'Donnell, 'Battling the Undertow in Latin America' in Larry Diamond (ed), *Consolidating the Third Wave Democracies: Themes and Perspectives* (Baltimore MD, Johns Hopkins University Press, 1997); A Varas, 'Civil-Military Relations in a Democratic Framework' in L Goodman, JSR Mendelson and J Rial (eds), *The Military and Democracy: The Future of Civil-Military Relations in Latin America* (Lexington MA, Lexington Books, 1990); P Smith, *Democracy in Latin America* (New York, Oxford University Press, 2005); G O'Donnell, PC Schmitter and L Whitehead (eds), *Transitions from Authoritarian Rule: Comparative Perspectives* (Baltimore MD, Johns Hopkins University Press, 1986).

Yet a few years later, both Chávez and Gutiérrez won presidential elections. And Ollanta Humala, an ex-member of the military ranks who also attempted an insurrection, recently came very close to winning presidential elections in Peru. In fact, in Latin America, anti-democratic behaviour has proven to be a very efficient means of launching a political career and acquiring visibility.[53]

In the face of this widespread trend, we argue here that the generalised, widely documented public rejection of corruption in democratic regimes applies as well to authoritarian governments. While the public in Latin America may tolerate authoritarian behaviour under certain circumstances, it has shown low tolerance for high-profile corrupt practices of authoritarian rulers. Even though grassroots constituencies in Latin America may approve of authoritarian leaders through their vote, these same citizens often reject leaders once they have been demonstrated to be corrupt. For example, Lucio Gutiérrez, who won elections in Ecuador after he failed to take and hold power outside the electoral process, was driven from office when he granted amnesty to Bucaram, who at the time faced criminal charges for corruption. Today, social activists and rights groups have recognised that corruption and economic crimes constitute strong foundations to challenge authoritarian rule.[54]

Despite high levels of popular rejection of corruption and acts of economic malfeasance in both democratic and authoritarian regimes, 'bottom-up', citizen-based TRCs have also regularly excluded economic crimes and corruption from their investigations.[55] While other causes may also explain this phenomenon, we suggest that the transfer and institutionalisation of a standard script from above accounts for the exclusion of corruption-related concerns. In other words, it should be expected that these commissions might omit economic crimes and corruption from their investigations in response to the institutionalised, widespread model established and fostered by official commissions.

A more pedestrian rationale is that citizen-based commissions are typically constrained by limited resources and basic technical capabilities.

[53] Interview with Osvaldo Hurtado, scholar and ex-president of Ecuador, Quito, Ecuador, (June 7 2006).

[54] A recent manifestation of this is found in a December 2005 Human Rights Watch report calling for the extradition of former Peruvian head of state, Alberto Fujimori, based largely on economic crimes involving malfeasance, indirectly related to rights violations. See Human Rights Watch, 'Probable Cause: Evidence Implicating Fujimori' (HRW, vol 17, No 6(B), 21 December 2005) In September, the Chilean Supreme Court authorised Fujimori's extradition on human rights and corruption charges. S Romero, 'Court Approves Extradition of Fujimori', *New York Times*, 21 September 2007.

[55] Examples of such TRCs include: Paraguay's *Comité de Iglesias para Ayuda de Emergencia* (CIPAE); Brazil's *Proyecto Nunca Más*, based at the Archdiocese of São Paulo; Guatemala's *Proyecto Interdiocesano de Recuperación de la Memoria Histórica*; and Bolivia's *Comisión Nacional de Investigación de Desaparecidos Forzados*.

Investigating acts of high-level fraud and embezzlement, which normally take place through complex and highly technical procedures, is beyond the capacity of community-based TRCs. In practice then, even though the grassroots and community-based TRCs may be concerned by acts of financial malfeasance, investigating these crimes may be beyond their resources.[56]

The problems faced by community-based TRCs in dealing with economic crimes and corruption, described above, are equally applicable to state-sponsored TRCs. However, community-based TRCs may hold the potential to pressure officials to overcome some of these impediments—especially those technical in nature—in a way that state-sponsored commissions may not, precisely because they are not part of the state apparatus. This detachment from the objects of their investigations is certainly an asset of community-based TRCs. Admittedly, to investigate economic crimes and corruption effectively, citizen-based TRCs would have to be given investigatory powers, and privileges to access classified information.

C De-legitimising Dictatorial Regimes, Attaining Consolidation

Under the functionalist view that dominated the political science literature for several decades, corruption was considered useful to political organisation and performance; it was seen as even more relevant during authoritarian times, as it provided 'zones of freedom and of free movement' and helped 'redistribute public resources by parallel means accessible to groups that would otherwise be excluded'.[57] More recently, strong challenges to the functionalist view have been advanced. These challenges, supported by empirical evidence, contend that both the experience and perception of corruption undermine regime legitimacy.[58] The argument that corruption's prevalence in many societies and its status as a parallel set of rules and

[56] However, even if community-based TRCs are not able to conduct such investigations on their own, they could exert pressure on government officials and state-based TRCs to include the issues within their mandates. Admittedly, breaking the standard script would require a high degree of local mobilisation and political momentum. However, community-based organisations may be the best advocates for expanding the scope of transitional efforts; in other words, challenging and ultimately modifying the standard top-down script is an effort that may be best attained from below.

[57] J Becquart-Leclerq, 'Paradoxes of Political Corruption: A French View' in AJ Heidenheimer, VT LeVine, and M Johnston (eds), *Political Corruption: A Handbook* (New Brunswick NJ, Transaction, 1989) 193, cited in M Seligson, 'The Impact of Corruption on Regime Legitimacy: A Study of Four Latin American Countries' (2002) 64 *The Journal of Politics* 408.

[58] Some of these studies are: SR Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge, Cambridge University Press, 1999); W Mishler and R Rose, 'What are the Origins of Political Trust?' (2001) 34 *Comparative Political Studies* 30.

accepted behaviours render it salutary to social processes is no longer dominant. Contemporary research on experience with corruption (not only perception) shows that those who experience corruption lose trust in the legitimacy of their regimes, and also lose interpersonal trust.[59]

Likewise, corruption and economic crimes are highly corrosive of confidence in the justice system.[60] One of the fundamental goals of transitional justice is to put an end to widespread impunity and to establish the rule of law. Impunity for economic crimes and corruption undermines this goal.[61]

Therefore, even in countries in which corruption is not deeply pervasive, addressing these issues within the context of truth commissions may be necessary to the consolidation of new democratic regimes, especially because

> [s]ituations of transition offer unique windows of opportunity to address issues of impunity which are of crucial importance in a society's development.[62]

If this is true—and we believe it is—investigating and documenting cases of economic crimes and corruption under military rule could help de-legitimise authoritarian regimes even more than investigations of human rights violations. If, as Seligson puts it,

> one of the major limitations that authoritarian regimes have in establishing their own legitimacy is that more often than not they operate as cleptocracies, in which the state is corrupt to its core, and citizens know it,[63]

making corruption during authoritarian regimes more visible through investigations during transitional periods would help erode their legitimacy. This is particularly true in cases in which dictatorships enjoy high degrees of legitimacy and popular support. Otherwise,

> citizens can seek alternatives to democracy through support for the return of military rule, or through support for populist but anti-democratic figures.[64]

[59] M Seligson, 'The Measure and Impact of Corruption Victimization: Survey Evidence from Latin America' (2006) 34 *World Development* 381.

[60] A United Nations Congress on Criminal Justice found that 'economic crimes affect people's sense of society's fairness, creating feelings of resentment'. Eleventh UN congress on Crime Prevention and Criminal Justice, held in Bangkok, Thailand (18–25 April 2005). Available online at http://www.un.org/events/11thcongress/docs/bkkcp08e.pdf.

[61] Van Vuuren, 'Apartheid Grand Corruption' (n 10 above) at 14 stresses this point, arguing that corruption entrenched in authoritarian rule does not vanish with the advent of democracy, but rather, 'inevitably serve[s] to corrode the new order'.

[62] Transparency International Kenya, (March 2006) 76 'Adili' News service Editorial 1, Nairobi. Available online at http://www.tikenya.org/documents/adili76.pdf .

[63] M Seligson, 'The Political Culture of Democracy in Mexico, Central America, and Colombia, 2004', Latin American Public Opinion Project (2004) at 43. Available online at http://www.vanderbilt.edu/americas/Docs/The%20Political%20Culture%20of%20Democracy%20in%20Mexico%20Central%20America%20and%20Colombia%202004.pdf.

[64] Seligson, 'The Measure and Impact of Corruption Victimization' (n 59 above) at 382.

The case of Augusto Pinochet illustrates the idea that corruption and economic crimes hold vast potential for de-legitimisation. At the same time, it corroborates the position that popular condemnation for economic malfeasance is significant and a potentially powerful political force. During the 17 years in which it ruled Chile, the Pinochet regime committed widespread and horrendous human rights abuses. Despite this, for nearly a decade, Pinochet and almost all of those in the chain of command avoided serious threat of prosecution at home, until the 1998 London arrest, pursuant to Spanish judge Baltazar Garzón's request. The London arrest led to indictments for rights abuses against many others during Pinochet's rule.[65]

Notwithstanding the enormous global, symbolic, and domino effect of the October 1998 London arrest, the greatest threat to the recently deceased Pinochet was not necessarily related to the human rights charges in Spain, England or Chile, but instead, to the discovery of secret bank accounts in Riggs Bank in Washington, DC. The Riggs case led not only to Pinochet's November 2005 arrest, but also the detention of 10 of his family members[66] and to further loss of stature and respect in Chile.

When on 23 November 2005, Chilean authorities placed General Augusto Pinochet under arrest on tax fraud charges in connection with recently discovered bank accounts holding millions of dollars, the New York Times reported the following day that

> Since returning to Chile after being freed from detention in Britain in March 2000 on Spanish court accusations of human rights violations and genocide, General Pinochet has twice been formally accused of human rights violations during the 17 years he was in power. But this is the first time he has been charged with other crimes, *and lawyers said the likelihood of a trial and conviction was greater on these charges* (emphasis added).[67]

Sebastian Brett, Chile researcher for Human Rights Watch and long-time analyst of Chilean politics, told the *Boston Globe* in early 2005 that the Riggs case affected Pinochet's image in Chile more than all the human

[65] See, eg N Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia PA, University of Pennsylvania Press, 2005). Pinochet's wife and son were also charged with tax evasion (see P Abramovich, 'Pinochet son arrested in case of US bank accounts', *Agence France-Presse*, 29 July 2004; 'Pinochet's wife, son arrested on tax evasion charges', *Deutsche Presse-Agentur*, 8 August 2005.) Pinochet was also investigated for his role in authorising 15 summary executions that took place within Operación Colombo in 1974 and 1975 ('Ponen Bajo Arresto Domiciliario a Pinochet por sus Cuentas Ilegales', *Diario El Clarín*, Santiago, 24 November 2005).

[66] PJ McDonnell, 'Pinochet Family Members Arrested', *Los Angeles Times*, 24 January 2006.

[67] L Rohter, 'Pinochet Held on Charges Linked to Bank Accounts', *New York Times*, 24 November 2005. Due to Pinochet's death in late 2006, neither pending human rights nor corruption charges could be concluded.

rights allegations. In a colourful yet powerful fashion, Lakshmanan wrote for the Boston Globe that

> there were many people who thought [abuses] may have happened, but that was the price they had to pay to get rid of a crazy socialist government, and at least [Pinochet] didn't line his pockets. Now the myth of Pinochet as the honest citizen has been shattered.[68]

While many in Chile today still tolerate and even justify violations of civil and political rights to achieve greater goods—for instance, security and economic development—those same Chileans categorically reject corruption and economic crimes.

IV LOOKING BEYOND LATIN AMERICA

Over the past 15 years, a second wave of states, primarily outside Latin America, has undergone transition from authoritarian and democratic rule. These states, much like those Latin American nations discussed above, have implemented transitional justice measures consistent with the growing international consensus, which provides a privileged place for truth commissions. As in Latin America, these states have, with some important exceptions, followed the dominant script with regard to economic crimes, even when this has differed significantly from indigenous demands. While TRC mandates have involved significant modifications and adaptations—such as naming perpetrators, expanding the range of civil and political rights covered, and providing pardon in exchange for confessions—they have consistently excluded economic crimes.

The most important and closely followed truth commission outside of Latin America has been the institution established to reckon with the crimes of the Apartheid state in South Africa. This TRC was created by the Promotion of National Unity and Reconciliation Act in 1995, an extensive and detailed enabling Act. Commentators have generally recognised the role of the South African TRC in the regional and global debate on truth commissions. In a recent text, John Daniel and Marisha Ramdeen analyse the impact of the South African TRC on other commissions in Africa. Daniel and Ramdeen note that

[68] IAR Lakshmanan, 'Old Allies' Support for Pinochet Wanes', *Boston Globe*, 13 February 2005.

> for academics and NGOs concerned with transitional justice, the South African truth commission process has become the model by which all other such commissions are evaluated.[69]

In Africa, they continue,

> [t]he attention that the South African truth-commission process attracted and its widespread international acclaim have seen this particular instrument come, in the last ten years, to form a part of the settlement packages in a number of African conflict situations.

Since the beginning of South Africa's transition, there have been over a dozen TRCs in Africa and Asia. A quick look at the mandates of the following TRCs reveals that they have followed the model of focus on gross violations of civil and political rights: Burundi (1995–96); Chad (1990); Germany (1992); Ghana (2001–04); Uganda (1986–94); Sri Lanka (1994–97); Zimbabwe (1985); South Korea (2002); Liberia (2006); Nigeria (1999); Haiti (1994–96); Sierra Leone (2002–04); East Timor (2001–05); Morocco (2004–06); Togo (2000); Fiji (2005). There have, however, been some exceptions. In East Timor, for example, the truth commission considered economic, social and cultural rights. That report, however, does not include economic crimes nor does it seek to identify individuals and high-level authorities responsible.[70]

Chad is the only other country in which the investigation of economic crimes was conducted by a Commission at the transition. The president, elected in 1990, created a 'Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories'. Even though this commission's recommendations were never implemented, it successfully investigated economic crimes of the Habré regime. The fact that this commission was implemented before a period in which the acculturation and expansion of an international standard model was widespread may confirm our preliminary hypothesis, namely, that local TRCs might include economic crimes if they are not highly influenced by the international script.

Two countries originally considered including corruption and economic crimes within the mandate of their official TRC, but ultimately did not. The first is Kenya. After the end of the Moi regime, democratically elected

[69] J Daniel and M Ramdeen, 'Dealing with Africa's Post-Independence Past: Truth Commissions, Special Courts, War Crimes Trials, and Other Methods' in R Southall (ed), *South Africa's Role in Conflict Resolution and Peacemaking in Africa* (Cape Town, HSRC Press, 2006).

[70] See Commission for Reception, Truth and Reconciliation Timor Leste (CAVR), 'Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste, Executive Summary' (2005), available online at http://www.etan.org/news/2006/cavr.htm. For a discussion of the range of transitional justice mechanisms pursued in Timor-Leste, see Stanley in ch 8 of this collection.

President Mwai Kibaki favoured establishing a truth commission. A Task Force on the Establishment of a Truth, Justice and Reconciliation Commission was created which discussed and ultimately provided the Kenyan Government with the mandate for the TRC. Although the inclusion of economic crimes was seriously considered by the Task Force, they were ultimately left aside.[71]

Makau wa Mutua, the chairperson for the Task Force, saw permanent judicial bodies as highly incapable of dealing with economic crimes because, added to the high levels of corruption within them, people who commit economic crimes are usually in a position to hire good lawyers and circumvent legal boundaries.[72] Further, he acknowledged that

> there is no one formula for a Commission. A Truth Commission is an instrument for producing transitional justice, so one would have to look at various models and Kenya's history when deciding on what the Truth Commission should look like.[73]

Still, the mandate of the TRC excluded corruption and economic crimes, incorporating 'international best practices', and was drafted with the advice and support of international NGOs, notably, the ICTJ.[74] The influence of other notable TRCs such as South Africa's has also been acknowledged.[75]

Ghana also excluded corruption and economic crimes. Although the original legislation creating the National Reconciliation Commission included a provision for the investigation of corruption, it was ultimately dropped. Instead, the investigation of these abuses was entrusted to the Serious Fraud Office (SFO), an institution that had earlier been used to repress opponents. In the end,

> the public hearings in Ghana have included a fair share of 'economic crime' hearings, partly because there was a significant amount of politically motivated property seizure that was accompanied by harassment and unfair arrest. It looks likely that one of the key recommendations of the commission will be restitution of property.[76]

[71] See Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission, Makau Mutua, Chairperson, *Report of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission* (Nairobi, Kenya: The Government Printer, 2003).

[72] Transparency International Kenya, *Adili* News service (n 62 above) at 6.

[73] Transparency International Kenya, *Adili* News service (n 62 above) at 3.

[74] Priscilla Hayner of the ICTJ provided advice at the invitation of the Task Force. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (n 18 above).

[75] 'We have learned a lot from the Truth and Reconciliation Commission of South Africa and other commissions in Latin America', said Kiraitu Murungi, the new justice and constitutional affairs minister of Kenya. Cited in Fredrick Nzwili, 'Kenya: Churches Back Truth Commission' in *Christianity Today*, 1 April 2003.

[76] P Hayner and L Bosire, 'Should Truth Commissions Address Economic Crimes? Considering the Case of Kenya' (New York, International Centre for Transitional Justice, 26 March 2003). Available online at www.tikenya.org/documents/TruthComm.doc.

The report, released by the Ghanaian government in April 2004, does include a section—albeit limited in scope—on restitution of property, which declares that

> those who suffered unlawful confiscation of property, such as lands and buildings should, in principle, have their properties restored to them.[77]

The mandate of the Liberian TRC includes economic crimes. As that Commission progresses, it will remain to be seen whether, and to what extent, these crimes and corruption are in fact documented.[78]

V CONCLUSION

This chapter has argued that, despite significant flexibility in certain aspects, TRCs have consistently excluded economic crimes and corruption from their mandates, focusing primarily on the priorities of the human rights movement as defined nearly two decades ago. The repeated exclusion of these issues across temporal and geographic boundaries, we suggest, may be caused by the international transfer of models and norms at the international, state level.

TRCs face a variety of constraints, related to political pressures, as well as limits on time, resources, and professional staff. Admittedly, the inclusion of corruption and economic crimes might serve to heighten these challenges. Nevertheless, investigating acts of economic malfeasance committed by authoritarian regimes may serve a variety of functions, rendering it a net gain for TRCs. First, investigation may provide a mechanism to address popular demands for accountability in an effective manner. Secondly, it may be highly functional to de-legitimising authoritarian regimes—even more so than denouncing violations of civil and political rights. Finally, investigating this class of crimes may prove highly useful to the consolidation of burgeoning democracies.

The time may have come to re-think, at least in part, the prevailing TRC paradigm. The human rights movement has undergone a relatively recent shift towards greater emphasis on economic, social and cultural rights. As a result, refocusing TRCs in accordance with this mandate expansion might well lead to greater inclusion of economic crimes and corruption as violations of economic, social and cultural rights. Yet, rather than waiting for the impetus to change from within human rights organisations, those

[77] See National Reconciliation Commission Report, *Recommendations for Reconciliation and Institutional Reforms*, vol 1 ch 8, October 2004. Available online at http://ictj.com/downloads/ghana/Ghana.NRC.V1.C8.Reforms.pdf.

[78] See 'An Act to Create the Truth and Reconciliation Commission (TRC) of Liberia', approved June 10 2005, Art IV, s 4(a), Mandate of the Commission (specifically enumerating 'economic crimes' within the scope of matters to be investigated.

considering TRCs in the future might arrive at the same goal by considering the origins, social function and goals of these bodies. In this vein, we would hope that the concerns outlined in this chapter related to grassroots demand to investigate economic crimes and corruption, as well as the other bottom-up issues raised throughout this volume, are afforded adequate weight.

Harvard Law School
Public Law & Legal Theory Working Paper Series
Paper No. 09-28

Looking Backward to Address the Future?: Transitional Justice, Rising Crime and Nation-Building

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James L. Cavallaro[*]

I. INTRODUCTION

> [A] major appeal of the Nazi regime was its image as a bastion of "law and order." The Nazi State incessantly declared that it was waging a successful "war on crime." . . . The Nazis' claim that they had instituted a respite from "lawlessness" is an enduring image of the regime that is similar to the myth of National Socialism's "eternal victory" over unemployment. Neither of these claims was greatly discredited in German popular memory, even after the colossal failure of National Socialism.[1]

This is not an Article about the Nazi regime's war on crime, nor does it analyze the possible lawlessness of the Weimar Republic. It does, however, consider the role of crime in transitional states. As such, the observation above is relevant to the issues examined in the pages that follow. Crime and the manipulation of the fear it promotes were essential to the rise of Nazism, the fall of the Weimar Republic, and the historical record of both regimes. The quotation above, in the context of this volume on nation-building, is intended to remind us of the potentially fatal challenge for transitional states and new democracies presented by crime, public insecurity, and their (mis)management.

Much as historians now understand Germany in the 1930s,[2] I contend that we must recognize the vital role of street crime in the stability and instability of newly democratic and transitional states, a role far more important in many ways than other, more studied threats to democratic stability and nation-building. Thus, for example, notwithstanding the overwhelming barrage of media coverage, academic analysis, and political punditry to the contrary, the greatest violent threat to human security, and by extension, to political stability, in the twenty-first century has not come from terrorism. Instead—and here, reliable data are quite clear—a far greater danger to human life in this century has been, and almost certainly will continue to be, non-political violent crime. A look at recent figures should resolve lingering doubts about this. According to the State Department's most recent *Country Reports on Terrorism*, there were 14,338 incidents of terrorism resulting in the deaths of 20,498 individuals worldwide

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1. MICHAEL BERKOWITZ, THE CRIME OF MY VERY EXISTENCE, at xiii-xiv (2007).

2. Like Berkowitz, who considers the attribution of criminality to Jews by the Nazis, *see generally id.*, historian Eric Weitz in a recent analysis recognizes the importance of the promotion of an image of law and order for the Nazis. *See* ERIC D. WEITZ, WEIMAR GERMANY: PROMISE AND TRAGEDY 349 (2006). He writes that "[t]he Nazi Party fomented disorder, yet—in a very nice game—successfully presented itself as the party of law and order against the Communists and 'alien elements' so many Germans feared." *Id.*

in 2006.[3] In that same year, homicides caused the death of 17,034 in the United States alone,[4] and likely more than 500,000 around the world.[5] Thus, it is fair to estimate that in any given year, globally, *more than twenty-five times* more violent deaths are caused by ordinary crime than by terrorist acts.[6]

Crime surveys and health data also demonstrate that homicide rates have risen steadily over the past several decades.[7] If the past is an indicator of the future (and it generally is), we can expect common crime to continue to pose grave threats to human security in years to come. Of particular relevance for this Article, in the scores of states that have undergone or continue to undergo some form of political transition over the past two decades, significant surges in crime have accompanied the process of change from authoritarian or totalitarian rule.[8] Further, police are generally unable to handle this crime surge. In many of these states, therefore, the inability to provide security to ordinary citizens becomes a major political issue, or even the main issue on the political agenda, with instability provoked by surging crime weakening support for democratic rule. Indeed, while human security is comprised of a range of elements, studies demonstrate that physical security and crime consistently overshadow other human security concerns in the eyes of the public. As Lucia Dammert and Mary Fran T. Malone have noted:

> The [United Nations Program for Development in Chile] describes seven dimensions of human security that are threatened by the current model of development: economic, alimentary, health, environmental, personal, societal, and political. Crime becomes a convenient scapegoat for citizens because they can channel all their insecurities into fear of crime, which is more tangible than these other economic, political, and social insecurities. [9]

Related to this concern, the experience of countries that have undergone transitions in recent years demonstrates that surges in crime, which accompany the transitional period, lead to citizen hostility toward those perceived as defending the

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3. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM (2007), http://www.state.gov/s/ct/rls/crt/2006/82739.htm. Of the 14,338 reported attacks, 6,630—about 45 percent—occurred in Iraq where approximately 13,000 fatalities —65 percent of the worldwide total—were reported. *Id.*

4. CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2006), http://www.fbi.gov/ucr/cius2006/data/table_01.html.

5. In its most extensive study on deaths resulting from homicide, the World Health Organization estimated that 520,000 homicides occurred in 2000. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 10, tbl.1.2 (2002), *available at* http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf. The estimate of 520,000 does not include an additional estimate of 310,000 deaths that resulted from "war-related" interpersonal violence. *Id.*

6. Here, I am using the 2006 figure for deaths attributed to terrorist acts by the State Department, *see supra* note 3 and accompanying text, compared to the 520,000 non-war homicides reported by the WHO in 2000, *see supra* note 5, and estimating no increase or decrease in projecting the figures for 2006.

7. *See, e.g.*, WORLD HEALTH ORGANIZATION, *supra* note 5, at 26-27 & 27 fig.2.2 (reporting that, between 1985 and 1994, in a study of sixty-six countries, youth homicide rates among males increased from fewer than ten to over twenty per 100,000).

8. *See generally* JAMES L. CAVALLARO, INT'L COUNCIL ON HUMAN RIGHTS POLICY, CRIME, PUBLIC ORDER AND HUMAN RIGHTS (2003).

9. Lucia Dammert & Mary Fran T. Malone, *Does It Take a Village? Policing Strategies and Fear of Crime in Latin America*, LATIN AM. POL. & SOC'Y, Winter 2006, at 27, 30 (2006) (citation omitted).

rights of criminals and criminal suspects. In this context, citizen concern with crime is transformed into hostility toward the defense of human rights and the rule of law. In transitional societies, this public sentiment and the pressure it promotes to restrict rights and/or cede power to authoritarian forces constitute grave threats to consolidating democratic stability.

These concerns take on still greater importance in today's world, as political analysts consider that roughly half of the world's governments may now be classified as transitional. To be sure, it is not clear that all of these states are transitioning in a linear manner to some type of democracy. As Thomas Carothers noted in 2002:

> Of the nearly 100 countries considered as "transitional" in recent years, only a relatively small number—probably fewer than 20—are clearly en route to becoming successful, well-functioning democracies or at least have made some democratic progress and still enjoy a positive dynamic of democratization. . . . Most of the "transitional countries," however, are neither dictatorial nor clearly headed towards democracy. They have entered a political gray zone. . . . [A]n uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is actually the most common political condition today of countries in the developing world and the postcommunist world.[10]

In these states as well as in newly post-transitional countries that have succeeded in establishing the institutional framework of democracy, ordinary crime represents a leading cause of loss of life and consequently is often perceived as a vital political issue by the domestic public. Thus, given the potentially severe consequences of citizen insecurity in such states and the high percentage of countries currently located on the spectrum of democratic transition, it is clear that common crime represents a significant threat to the stability of much of the developing world.

Despite all this, I contend, insufficient attention has been paid during the transitional era to addressing ordinary crime during transitions and beyond. Nation-building, the central task of transitional efforts and the unifying theme of this volume, requires much more attention to common crime and to the establishment of transparent, efficient, and democratic police and criminal justice systems to control it. Unfortunately, transitional justice, as a field, has instead focused disproportionately on abuses of the past and the means of redressing (or pardoning and overcoming) these violations. This focus, of course, makes sense. States transitioning from periods of gross violations of fundamental rights, internal conflict, and even civil war cannot move forward without some process of reckoning with their pasts. To date, this process of reckoning has been quite varied, with transitional justice approaches ranging from amnesty laws to national criminal prosecutions, and from international or hybrid tribunals to truth and reconciliation commissions. To be fair, these transitional processes have increasingly addressed the issue of criminal justice and police reform, once again with a significant range of responses. Yet, I argue, in their consideration of the criminal justice system, transitional processes have been characterized by an emphasis on preventing the types of abuses committed by state agents acting under prior authoritarian or totalitarian governments, such as politically targeted secret

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10. Thomas Carothers, *The End of the Transition Paradigm*, J. OF DEMOCRACY, January 2002, at 5, 9, 18.

abductions, torture, and summary executions. Again, these issues are vital ones and must be addressed if a state's security forces are to become democratic. But responding to these abuses, while necessary, is not sufficient to address the major challenges faced by the criminal justice and police forces in the transitional period and beyond.

Rather than focusing solely on past abuses, I argue, transitional states must think and plan prospectively for the surges in ordinary crime and the accompanying public outcry that will almost inevitably come with the process of transition. These states must also consider the range of challenges for democratic security posed by criminal violence, some of which are quite severe. In other words, transitional states must focus as much or more on the types of problems that can reasonably be anticipated (through a prospective, system-wide focus) as on those that have historically plagued them during periods of non-democratic rule.

To support this contention, this Article draws on three case studies, two from Latin America (Brazil and El Salvador), and one from sub-Saharan Africa (South Africa).[11] It first briefly considers the similarity in focus of transitional justice approaches to police and criminal justice reform, invoking acculturation theory to explain the replication of a dominant, backward-looking script across different transitional states. Next, it considers the frequent inability of police and the criminal justice system to cope adequately with rising crime using these replicated scripts and the consequences of this failure for the defense of human rights, the rule of law, and the stability of new democracies. The Article assesses the particular dynamics of these processes for each of the three country case studies. Throughout the Article, I seek to demonstrate that it is crucial to address deficiencies in domestic criminal justice systems precisely during periods of transition and that criminal justice solutions should be developed at this time—to the extent possible—in an objective and comprehensive fashion, rather than in ways that seek to respond to problems of the pre-transitional state. In this way, I suggest, transitional justice can progress beyond existing, backward-looking frameworks to build nations capable of addressing the challenges they will face as they move forward.

II. THE FOCUS OF TRANSITIONAL JUSTICE: RECKONING WITH THE PAST

As one commentator has noted, transitional justice may be defined as the way in which "societies 'transitioning' from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek 'reconciliation,' and how they create justice systems so as to prevent future human rights atrocities."[12] Another leading figure in the field, Priscilla Hayner, has noted that the "basic question [of transitional justice is] how to reckon with massive state crimes and abuses."[13] The

11. This Article builds on previous work addressing the post-transitional work of human rights groups in these countries. *See* CAVALLARO, *supra* note 8; James Cavallaro & Mohammad-Mahmoud Ould Mohamedou, *Public Enemy Number Two?: Rising Crime and Human Rights Advocacy in Transitional Societies*, 18 HARV. HUM. RTS. J. 139 (2005). Here, however, I seek to focus on how the surge in crime and consequences for transitional states should inform thinking and practice during the transitional period.

12. Charles T. Call, *Is Transitional Justice Really Just?*, BROWN J. WORLD AFF., Summer/Fall 2004, at 101.

13. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 11 (2001).

focus in these definitions—and in many others—is clearly on the process of reckoning with the past and, in particular, human rights violations committed by repressive regimes. Even its view towards the future is framed by the past: under this model, the development of justice systems, rather than responding to future challenges, should ensure the prevention of the atrocities that marked the past. Significant attention in the study of transitional justice has been devoted to the different approaches and dimensions—normative, religious, legal, practical—that frame the process or processes by which states address past abuses. Perhaps the most important tension in this area concerns the relevant roles given to retributive rather than restorative justice. Martha Minow's seminal text frames the primary tension slightly differently as between vengeance and forgiveness.[14] Yet both retributive and restorative justice, as well as vengeance and forgiveness, as understood in transitional justice mechanisms, focus primarily on the relationship among past violators (security forces), victims (real and perceived opponents of the state), and the broader society. As such, they do not necessarily address directly the relationship among future violators (common criminals or police), victims (ordinary citizens or criminal suspects), and the society as a whole.

This Article does not enter into the rich debates on the issue of retributive versus restorative justice, nor the many related questions that flow from this tension. Instead, it focuses on the commonality of most approaches to transitional justice, at least insofar as the field has focused on addressing past violations as a means of strengthening the capacity of the transitional state to move forward. The flaw with this approach at a theoretical level, I suggest, is that in some areas (and here, I include the criminal justice system and police), addressing the future in transitional societies may require approaches *not* linked directly to past abuse. Instead, it may be the case that the best approaches to the criminal justice system and police, while grounded in an understanding of the impact of transition on crime, should not seek guidance for future direction from efforts to correct past mistakes and patterns of abuse. In this sense, these approaches would represent a marked difference from the practice that has characterized the field to date.

III. TRANSITIONAL JUSTICE EFFORTS AND THE REPRODUCTION OF SCRIPTS

This Article does not purport to consider exhaustively the contours of the current transitional justice model's focus on reckoning with the past, nor why a particular consensus in favor of this focus on reckoning has developed. Still, it might be helpful to our consideration of means of responding to this focus to begin with a brief reflection on recent scholarship on the dissemination of global governance models in the field of human rights. Here, sociology's neo-institutionalism, or World Society School, may help to explain some of the factors at work. This school of thought seeks to explain the proliferation of worldwide governance models that draw on the same set of global scripts despite the existence of real differences between and among political contexts, differences that should result in greater variety in modes of governance.[15]

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14. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9-24 (1998). Other chapters in the volume consider trials, truth commissions and reparations. *Id.* at 25, 52, 91.

15. *See* Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1753 (2003).

Ryan Goodman and Derek Jinks have strengthened this framework with international relations scholarship, offering an account of state behavior based on the socialization of global models or scripts.[16] Goodman and Jinks argue that state behavior in the field of human rights is highly influenced by the surrounding international environment. In particular, the influence of this environment leads governments to copy the actions of other states through mimicry, identification, and status maximization, a collective process termed *acculturation*.[17] The result of this process is that the institutional models adopted by states often take strikingly similar forms across space and time (that is, displaying *isomorphism*), despite the fact that the particular regional and political contexts of the states in question may differ greatly and thus demand differing institutional approaches.

In another text, with co-author Sebastian Albuja, I have argued that these top-down, transitional justice schemes based on standard international models may have been adopted by states largely as a result of this process of acculturation, and not necessarily as a consequence of the suitability of these models for context-specific needs.[18] Acculturation helps to explain the similarity of approach between and among truth commissions along important dimensions, despite the different contexts that these commissions are meant to address.[19] This Article suggests that acculturation may also help explain the similarity in focus of transitional justice approaches to the criminal justice system—that is, the excessive focus on reckoning with the past and designing institutions based on avoidance of the errors of that past. Though both vital and understandable, this focus might not be most suitable for transitional states almost certain to face crime waves, along with threats to human security and political stability.

In their focus on denouncing and documenting gross violations of civil and political rights, transitional justice approaches have empowered societies to consider and apply a range of solutions to respond, however inadequately, to past abuses. However, based on the case studies that follow, I suggest that these models have failed to address the problems of rising crime prospectively and thus have failed to respond adequately to the threat that criminal violence poses to new democracies. To the extent that choices during the transitional period are the result of acculturation, however, there is hope that critical reevaluation based on the experience of states that have undergone transitions may lead to the implementation of more adaptive models. In particular, states in the process of developing and restructuring criminal justice systems and police forces may learn from the experience of states that have focused on reform based on backward-looking efforts focused on politically motivated abuses.

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16. *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004).

17. *Id.* at 626.

18. *See* James L. Cavallaro & Sebastián Albuja, *The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond*, *in* TRANSITIONAL JUSTICE FROM BELOW (Kieran McEvoy & Lorna McGregor eds., forthcoming July 2008).

19. *Id.*

IV. CRIME AND TRANSITION

Over the last quarter of the twentieth century and the beginning of the twenty-first, criminal violence has increased around the world.[20] In research done in Argentina, Brazil, Peru, Nigeria, South Africa, Ukraine, and Russia, a team of researchers for the International Council on Human Rights Policy found consensus among government officials, criminal justice practitioners, and civil society members interviewed, as well as in the available official statistics, on the existence of surges in violent crime during the transitional period.[21] This research found greater consensus still on the general sense that the public's perception of insecurity had increased significantly in the transitional period.[22] The research team also considered the nature of official responses to rising crime in these transitional societies.[23] An article I wrote with co-author Mohammad-Mahmoud Ould Mohamedou based on this study observed that:

> Police forces in authoritarian states tend to suppress not only dissent but also criminality, or at a minimum, they are widely perceived as being effective at crime control. To the extent that it is not merely a misperception, such "control" is achieved at a high cost to individual rights and the rule of law. Prior to transition, crime control in all the states considered here focused on repressive and frequently brutal methods, including systematic torture and summary execution of suspects.[24]

Further, that piece noted that one particularly difficult aspect of crime control associated with periods of transition is the demobilization or reform of repressive security forces used during authoritarian and totalitarian regimes, both to control political dissent and to fight crime:

> One of the first acts of new governments is often to dismantle the old security apparatus, often leading to a security vacuum. This gap leads to wide-spread appeals for more effective order maintenance, especially by people who have been victimized and who attribute their victimization to this vacuum. . . . Such collective anger shapes the nature of the request for more effective order maintenance, frequently through increased demands for retributive justice. . . . [T]hese demands result in the mobilization of repressive responses, that is, measures designed to crack down on crime through police sweeps, raids, and similar tactics. . . .
>
> In the context of a security vacuum, state policymakers in transitional societies are charged with the difficult task of assuring citizen safety while not allowing police and other security forces to revert to abusive practices characteristic of the pre-transitional society. This is a challenge that is seldom met. In many circumstances, authorities turn a blind eye to continued abusive practices. In other instances, they may encourage police to continue to crack down on crime, knowing that in practice this will entail serious rights abuse.[25]

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20. CAVALLARO, *supra* note 8, at 19.

21. *Id.* at 4-5, 16; *see also* Cavallaro & Mohamedou, *supra* note 11, at 144.

22. Cavallaro & Mohamedou, *supra* note 11, at 144.

23. CAVALLARO, *supra* note 8, at 26-27.

24. Cavallaro & Mohamedou, *supra* note 11, at 145 (citation omitted).

25. *Id.* at 146-47. I am indebted to Clifford Shearing and Janet McCarthy who expressed these ideas in a framing paper as part of the research process for the International Council on Human Rights Policy study on crime, public order, and human rights. *See* Clifford Shearing & Janet McCarthy, *Crime, Rights and Order: Reflecting on an Analytical Framework* (Int'l Council on Human Rights Policy, 2001).

Despite this tendency to support repressive responses, transitional authorities rarely succeed in controlling violent crime. Instead, experience demonstrates that transitional police are quite poor in suppressing crime. As the case studies below demonstrate, crime surges follow the transition with predictability. The consequences are nearly immediate for new democratic authorities: public outrage not only presses them to take drastic measures, but also undermines their capacity to govern and, in extreme cases, threatens the stability of the transitional government.

V. THREE CASE STUDIES

A. Brazil

1. Authoritarian Abuses and the Focus of Transitional Efforts

Along with its southern cone neighbors, though perhaps to a lesser extent, military authorities in Brazil engaged in widespread, politically motivated violations of core civil and political rights during the 1964-1985 military dictatorship, torturing thousands and kidnapping and murdering hundreds of dissidents, activists, and guerrillas.[26] After twenty-one years of military rule, Brazil began a transition at the federal level with indirect presidential elections in 1985, followed by a constitutional assembly that led to the drafting of the 1988 constitution.

In many ways, efforts to redress the abuses of the military period focused on the constitution. That document, as a result, is quite advanced in its direct protection of rights, as well as its incorporation of international human rights instruments into domestic law.[27] Reform of the criminal justice sector and police, however, was not a major focus of the constitutional reform. As scholar Paulo de Mesquita Neto observes, the 1988 constitution "promoted very limited changes to the structure of the public security system established under the authoritarian regime."[28] In addition, as Emilio Dellasoppa and Zoraia Saint'Clair Branco noted recently, "Fifteen years after the 1988 constitution, the federal police force still lacks framework legislation, as does the civil police force of the state of Rio de Janeiro."[29] While debate in Brazil on reforming the structure of the police has been significant for the past several decades, concrete changes have been very difficult to implement. Indeed, as Mesquita Neto notes, "Despite the transition to democracy and the new constitution, there were few changes in the public-security system established during the authoritarian regime."[30]

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26. *See generally* ARCHDIOCESE OF SÃO PAULO, TORTURE IN BRAZIL: A SHOCKING REPORT ON THE PERVASIVE USE OF TORTURE BY BRAZILIAN MILITARY GOVERNMENTS, 1964-1979 (Joan Dassin ed., Jaime Wright trans., 1986).

27. *See* CONSTITUIÇÃO FEDERAL [C.F.], art. 5 (Brazil).

28. Paulo de Mesquita Neto, *Crime, Violence and Political Uncertainty in Brazil*, *in* CRIME AND POLICING IN TRANSITIONAL SOCIETIES: 30 AUGUST–1 SEPTEMBER 2000, 77, 82 (2000), *available at* http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4865_2.pdf.

29. Emilio Enrique Dellasoppa & Zoraia Saint'Clair Branco, *Brazil's Public-Security Plans*, *in* PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS 24, 25 (John Bailey & Lucía Dammert eds., 2006).

30. Paulo de Mesquita Neto, *Public-Private Partnerships for Police Reform in Brazil*, *in* PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS, *supra* note 29, at 44, 47.

2. The Surge in Crime and Political Consequences

Figures over the past two decades demonstrate a clear surge in violent crime corresponding to the first stage of transition in Brazil. According to a recent study, the homicide rate in Brazil doubled over the sixteen year period from 1980 to 1996, from 11.7 per 100,000 residents to 23.7.[31] Over the same period, the rate of homicide with firearms nearly tripled, rising from 5.1 per 100,000 residents to 14.0.[32] Along with the rise in homicides, Brazil has witnessed the growth of gang violence and organized criminal activity. The most visible manifestation of the power of these groups to provoke instability came in May of 2006 when a series of prison revolts and attacks on public buildings organized by the First Command of the Capital (*Primeiro Comando da Capital*, or PCC) effectively paralyzed São Paulo for several days.[33] Even before the May 2006 attacks, the PCC had demonstrated its strength within the prison system by coordinating simultaneous uprisings in detention centers throughout the state five years earlier.[34] In Rio de Janeiro, several criminal gangs have operated throughout the state and beyond in a range of organized illicit activities.[35] Public insecurity in major metropolitan areas in Brazil is widely considered to top the concerns of urban dwellers and plays a key role in politics at the state and national level.[36] Crime surges routinely provoke calls for military intervention in policing, if not in governance. They have also led to a boom in private security and vigilantism.[37]

In Brazil, and throughout the region, broad segments of society have grown increasingly disillusioned with democratic rule, in significant part due to the perceived

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31. Mesquita Neto, *supra* note 28, at 78.

32. *Id.*

33. *See* James L. Cavallaro & Raquel Ferreira Dodge, *Understanding the São Paulo Attacks*, REVISTA: HARV. REV. OF LATIN AM., Spring 2007, at 53. The attacks in May have been described in the following terms:

> In May 2006, [the PCC] launched an organized campaign of revolts in 83 prisons and 274 attacks on police stations, fire departments, private schools, hospitals, the public prosecutors' office, automatic teller machines, and city buses. In the first four days, the planned violence claimed the lives of 31 police officers, eight prison agents, and four civilians. The wave of attacks caught the city by surprise (although authorities had some prior knowledge) and its lack of preparation showed. Thousands of terrified residents refused to leave their homes to go to work and school (in part, unable to do so because of the destruction and interference in public transportation); many others left early. São Paulo, South America's greatest economic hub, nearly ground to a halt in the coming days, costing the city and the region tens of millions of dollars.

Id.

34. *Id.* at 54.

35. *See generally* ENRIQUE DESMOND ARIAS, DRUGS AND DEMOCRACY IN RIO DE JANEIRO: TRAFFICKING, SOCIAL NETWORKS, & PUBLIC SECURITY (2006) (discussing the political operations of criminal gangs in Rio de Janeiro).

36. Cavallaro & Dodge, *supra* note 33, at 54.

37. Cavallaro & Mohamedou, *supra* note 11, at 155-56. For example, Teresa Caldeira has found:

> [T]he relationship between the Brazilian illegal market in security services and uniformed security guards in private condominiums, where policemen or ex-policemen (who have their own guns) are paid to "clean up any major problem." This market interacts with many of the same personnel who act as *justiceiros* (literally "justice makers"), but who are more accurately described as death squads engaged in summary executions.

Id. at 156.

inability of elected leaders to control ordinary crime. In a 1996 *Latinobarómetro* poll, only 50% of Brazilians questioned responded affirmatively to the statement, "Democracy is preferable to any other type of government," the second lowest level of support among eighteen Latin American countries surveyed.[38] In that year, only Hondurans manifested lower levels of support for democratic rule.[39] In 2007, support for democracy in Brazil had fallen further, to 43%.[40] By then, three countries joined Honduras with levels lower than those in Brazil: El Salvador, Guatemala, and Paraguay.[41] Interestingly, all three are states that had undergone transitions and crime surges between 1996 and 2007.[42] Also of note, as the *Economist* observes, the 2007 annual poll represents the first time that "crime seems about to displace unemployment at the top of the list of problems in the region."[43]

B. El Salvador

1. Authoritarian Abuses and the Focus of Transitional Efforts

The civil war in El Salvador during the 1980s was extremely violent and marked by atrocious rights abuses, including widespread summary executions, death squad murders, forced disappearances, torture, and routine violations of other basic civil and political rights. Estimates place the number killed at 75,000.[44] Thousands were forcibly displaced from their homes; thousands more fled into exile in the United States, primarily, as well as to neighboring states. Along with Nicaragua, El Salvador occupied a central role both in the region and in United States foreign policy, leading the small Central American state to become the focus of significant attention throughout the period of civil strife and during the first years of transition. In 1991, the United Nations established a mission in the country to broker a peace agreement between the warring factions.[45] This mission, ONUSAL, by its Spanish acronym, played a key role in designing transitional justice measures.

As in other states recovering from civil war, El Salvador sought to confront its violent past and its record of horrendous human rights abuses. In many ways, in part due to the significant international influence in the transitional period, El Salvador is perhaps the best case of an apparent good faith effort to overhaul the main component of the criminal justice system: the police. As part of the ONUSAL accords, the national police forces were disbanded and reconstituted as the National Civil Police, or *Policía Nacional Civil* (PNC), incorporating former security and guerrilla forces.[46] Quotas were established for police, military, and rebels: 20% of the new police force

38. *The Latinobarómetro Poll: A Warning for Reformers*, THE ECONOMIST, Nov. 17, 2007, at 45-46.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR 2 (2007), *available at* http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf. The Author supervised this research project in El Salvador and edited the text along with Spring Miller.
45. S.C. Res. 693, 46th Sess., U.N. Doc. S/RES/693 (May 20, 1991).
46. INT'L HUMAN RIGHTS CLINIC, *supra* note 44, at 9-10.

would be comprised of former state security forces, 20% would be former guerrillas, and 60% would be persons not directly engaged as combatants.[47] Initial assessments of the design were favorable.

However, this fundamentally backward–looking political accord would be undone in practice by political forces. The restructuring process sought to counter the predominant historic use of the national police force, that is, as a means of exerting extreme violence for political ends. The balancing of percentages of ex-security forces and rebels incorporated responded to a political logic, rather than a holistic approach to police reform. Compounding the difficulties that would eventually undermine this ambitious project was the politicized nature of its implementation from the very start. As a study that I directed for the International Human Rights Clinic at Harvard Law School has observed:

> Domestic human rights organizations and international observers trace many of the PNC's current problems to its initial composition. . . . The post-war government did not abide by the terms of the peace accords [with respect to limited inclusion of former security forces and rebels], going so far as to "plac[e] former military personnel into the new force, including the wholesale incorporation of units slated to be disbanded." . . . The strong presence in the PNC of actors associated with the militarized public security institutions from the years of military rule has seriously undermined its capacity to help protect human rights and build the rule of law in El Salvador.[48]

The Harvard Clinic report concludes that as a result of the political manipulation of the PNC:

> A decade and a half after the signing of the peace accords, combat affiliations may not be as visible or as expressly divisive as they were in the mid-1990s; however, the PNC is still seen as an institution that is frequently more responsive to powerful political and economic forces than to the exigencies of the rule of law.[49]

To date, as the Harvard Clinic report notes, the PNC continues to be highly politicized and inefficient.[50]

2. The Surge in Crime and Political Consequences

In the years since the transition in El Salvador, registered levels of non-political, violent crime have soared. While there is debate among social scientists about the reliability of official figures, those who study crime and violence in the country agree that the homicide rate has reached troubling levels. As José Miguel Cruz observes:

> According to various sources, after the civil war and during the development of the new police, El Salvador faced one of the highest crime rates in the Western Hemisphere in recent years. . . . Some estimates suggest that rates increased to as high as 130 homicides per one hundred thousand population; others suggest lower rates. There is little doubt that during the years following the signing of the peace accords,

47. *Id.* at 10.
48. *Id.* (citations omitted).
49. *Id.*
50. *See id.* at 10-11.

> the rates reached a minimum of approximately 80 homicides per one hundred thousand population, which is a quite severe problem.[51]

Given these alarming statistics, it should come as no surprise that crime and responding to crime has become a central—if not *the* central— issue in contemporary El Salvadoran politics. It has also become the subject of significant manipulation and fear mongering as a means of promoting reactionary policies that threaten core democratic principles. In 2003, for example, the legislature, pressed by the President and in response to growing concern about criminal gangs, adopted an anti-gang law so marred with violations of individual rights that even in the midst of anti-crime hysteria in April 2004, the Supreme Court invalidated several sections.[52] Another form of manipulation of crime involves both the intensified media coverage of, and actual increase in, brutal homicides in the days and weeks immediately prior to national elections. The Harvard Clinic found, for example, a significantly higher number of killings reported in the month preceding elections as compared to other periods, as well as a clustering of extremely brutal killings.[53]

C. South Africa

1. Authoritarian Abuses and the Focus of Transitional Efforts

The apartheid regime in South Africa was marked by severe, widespread rights abuses, including political killings, torture, and the routine violations of core civil rights, abuses inherent in a racially-stratified system. After decades of well-documented and repressive rule, and a successful campaign to end apartheid that transcended the country's borders, South Africa embarked on an ambitious social transformation project. Its transitional process was closely followed by many of the same international forces engaged in the struggle against apartheid.

The structures created during the transition sought to respond to the worst abuses committed by the previous repressive regime. The Truth and Reconciliation Commission (TRC), created in 1995, focused on gross violations of human rights rather than lesser abuses and addressed only abuses considered overtly political.[54] This focus may have led those who designed South Africa's transitional justice mechanisms to fail to appreciate the dynamics of police reform, as well as the mundane challenges faced by South Africa's population.

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51. José Miguel Cruz, *Violence, Citizen Insecurity, and Elite Maneuvering in El Salvador*, *in* PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS, *supra* note 29, at 148, 152 (citation omitted).

52. INT'L HUMAN RIGHTS CLINIC, *supra* note 44, at 38-41.

53. *Id.* at 72-74.

54. *See* Janine Rauch, *The South African Police and the Truth Commission*, 36 S. AFR. REV. SOC. 208 (2005). Rauch notes:

> The TRC final report made a recommendation on these issues that seemed to come out of left field:—that provincial governments should not be permitted to exercise 'unfettered power' over Provincial Police Services. The TRC report-writers seem to have been unaware of the complex Constitutional arrangements for national, provincial and local accountability of the new police service, and of the contents of the 1996 South African Police Services Act, which created mechanisms and procedures for the relationship between national and local governments in respect of policing. As such, this recommendation of the TRC was not implementable.

Id. at 226 (citation omitted).

The first several years of the transition addressed the need to transform the apartheid police into a more democratic force. As Elrena Van Der Spuy observes, Western assistance for policing during this process "was driven by the need to transform an apartheid institution into an accepted and legitimate organ of social control."[55] Not until the second phase of foreign assistance that started in 1996 were Western efforts "directed to the emergence of 'crime' as one of the most central challenges facing the stabilisation of the emerging industrial democracy. Within this context the lack of institutional capacity inside the police machine to counteract crime became starkly evident."[56]

Still, even after 1996, police reform efforts failed to respond adequately to the threat posed by ordinary crime. Analysts Anton du Plessis and Antoinette Louw conclude, for example, that short-range thinking driven by political pressures prevailed well after the recognition that ordinary crime had become a major issue in South Africa.[57]

2. The Surge in Crime and Political Consequences

Writing in 2003, Tony Roshan Samara summarized the crime surge in post-apartheid South Africa in the following terms:

> Figures are now available . . . for all years between 1994–2001. What they show is that, with the exception of murder, major crimes have increased substantially in almost every category in all nine provinces of the country. The decline in murders, furthermore, is likely due to the decline in political violence after 1994, more than to improvements in policing and the criminal justice system. The exception to this trend is the Western Cape, where murders have increased since 1994 by 32 per cent.[58]

Furthermore, researchers du Plessis and Louw conclude, "the figures recorded by the police after 1994 indicate that recorded crime in South Africa has increased by 30% over the past decade. Recorded violent crime has increased more than any other crime type (by 41% compared to 28% for property crime)."[59] Due to the lack of reliable statistics from before the transition, it is difficult to demonstrate with absolute certainty the existence and degree of increase in crime after the end of apartheid.[60] Whatever the reliability of crime statistics in post-apartheid South Africa, however, popular

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55. Elrena Van Der Spuy, *Foreign Donor Assistance and Policing Reform in South Africa*, 10 POLICING & SOC. 343, 349 (2000).

56. *Id.*

57. Anton du Plessis & Antoinette Louw, *Crime and Crime Prevention in South Africa: 10 Years After*, 47 CAN. J. CRIMINOLOGY & CRIM. JUS. 427 (2005).

58. Tony Roshan Samara, *State Security in Transition: The War on Crime in Post Apartheid South Africa*, 9 SOC. IDENTITIES 277, 285 (2003).

59. du Plessis & Louw, *supra* note 57, at 428 (citation omitted).

60. While there is broad consensus that reported crime has increased since the transition, there is significant debate about the extent of the increase, and even about the existence of a rise in crime, as opposed to an increase in reporting. One leading scholar notes that in South Africa "no reliable crime statistics for the whole country were recorded before January 1994." MARK SHAW, DEMOCRACY'S DISORDER? CRIME, POLICE AND CITIZEN RESPONSES IN TRANSITIONAL SOCIETIES 9 (2002). Roshan Samara writes that "[i]t is very possible that crime was equally high prior to 1994, but was not reported to police, and was not an object of police investigation." Samara, *supra* note 58, at 285-86.

response to perceived insecurity was palpable. In particular, public concern with the inability of police and public authorities to control crime grew in the aftermath of the euphoria of the transition.[61] Researchers Sekhonyane and Louw found that seven years after the first democratic elections, the overwhelming majority of South Africans doubted the government's ability to control crime.[62] Reviewing this research, the International Council on Human Rights Policy noted:

> In 2001, less than one in ten South Africans (nine per cent) believed that government had "full control." Nearly half (forty-nine per cent) said government had "some control." No less than thirty-five per cent thought government was "not in control." The remaining (seven per cent) of the sample said they did not know.[63]

Lack of confidence in the police led to the growth of the private security industry and a boom in vigilante groups.[64] Over the past decade, crime has increasingly earned a central position in South African politics. Not only has vigilantism grown, but anti-democratic discourse and appeals for other violent and repressive measures to control crime have gained strength from the perceived inadequacy of democratic authorities to respond to the challenge posed by crime.[65]

VI. CONCLUSION

This Article has sought to establish that transitional justice, at least in the three case studies examined and almost certainly more generally, has prioritized reform measures based on backward-looking efforts to redress the crimes of the past and, through that redress, to prevent their commission in the future. In doing so, these mechanisms have failed to comprehensively prepare for one of the principal threats associated with transitional states: ordinary crime.

Restructuring criminal justice and police systems is a difficult process, rife with political barriers and constrained by limited resources. Even if reformers were to take a holistic approach to change during the transitional period, the challenges they would face in police and criminal justice reform would be daunting. There are few clear answers among scholars and practitioners in the field of criminal justice to the questions that would animate any attempt to restructure police forces during a transition. Still, there is reason to believe that they might fare better in combating ordinary crime if their point of departure were the future needs and challenges to be faced by the police and criminal justice systems, rather than the need to avoid repetition of the past.

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61. *See* du Plessis & Louw, *supra* note 57, at 429.

62. Makubetse Sekhonyane & Antionette Louw, *Violent Justice: Vigilantism and the State's Response* 14 (Inst. for Sec. Studies, Monograph No. 72, 2002).

63. CAVALLARO, *supra* note 8, at 86.

64. *Id.* at 86-88.

65. *Id.* at 42, 86.

Articles

Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas

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The authors would like to thank: Professors Henry Steiner, Ryan Goodman, Rosanna Cavallaro and Michael Stein; Ariel Dulitzky of the Inter-American Commission on Human Rights; Tanya Monforte for her research assistance; and the David Rockefeller Center for Latin American Studies of Harvard University for its support of their research.

INTRODUCTION

Human rights activists routinely presume that more is more: that more treaties, more norms, more litigation, more laws, more expansive judgments, etc., necessarily result in greater rights protection. This Article questions that supposition in the context of economic, social, and cultural rights in the Inter-American system. We argue that, given the limited resources of this system, the potentially adverse consequences of developing legal standards that may not be applied, and the potential—inherent in the development of novel jurisprudence—for undermining states' respect for the system itself, less frequent and more focused litigation may, in fact, be more valuable. In particular, we urge lawyers

and activists in the Inter-American system to recognize the limited and often subsidiary role of legal advocacy in promoting the recognition of economic and social rights and distributive justice. In the end, we conclude that successful promotion of economic, social, and cultural rights in the Inter-American system should be incremental, firmly grounded in established precedent, and always linked to vigorous social movements and effective advocacy strategies.

This Article urges human rights practitioners, petitioners, lawyers, and judges, particularly those at the international level, to think both creatively and critically about strategies for developing the legal and political architecture necessary for the effective enforcement of economic, social, and cultural rights. In particular, we argue for a pragmatic approach to developing this architecture within the Inter-American system that focuses on the real-world impact that litigation of individual cases is likely to have. We posit that those who seek sustainable, structural, transformative changes of Latin American society—and not merely sterile, judicial recognition of economic, social, and cultural rights—are best served by adopting a restrained, incremental, "less as more" approach to expanding these rights in the Inter-American system.

A review of the degree of compliance with the determinations of the Inter-American system, as well as our experience as activists in the international arena, has convinced us that the impact of international litigation is significantly enhanced when cases are accompanied by social pressure on domestic authorities through a variety of other means. By contrast, litigation strategies that are not linked to other forms of pressure rarely achieve major impact and often are irrelevant in a way that undermines the strength of supranational judicial bodies. In many instances, the degree of impact is most closely linked not to the importance of the Inter-American system's actions in a particular case, but rather to the level of media and public interest in the matter and the extent to which the government is pressured to respond (ordinarily, by social movements and/or the media). Case studies across Latin America, several of which we examine as part of our inquiry, illustrate this point.

Given the relatively solid theoretical and legal basis of human rights in Latin America,[1] this Article focuses on approaches to increasing protection for economic, social, and cultural rights in practice. In particular, we consider the possibilities for expansion of these rights through their recognition and enforcement by the two human rights oversight bodies of the Organization of American States: the Inter-American Commission on Human Rights (the "Commission" or the "Inter-American Commission") and the Inter-American Court of

1. *See infra* Part I, Economic, Social, and Cultural Rights in the Americas.

Human Rights (the "Court" or the "Inter-American Court"). We begin by analyzing the conditions necessary for the implementation of economic, social, and cultural rights, then argue for an approach to advocacy in the Inter-American system that most effectively utilizes this intergovernmental mechanism to create these conditions.

To contextualize our analysis, we present a brief overview of the history and operation of the Inter-American human rights enforcement mechanisms, followed by an analysis of the extent to which—and the conditions under which—decisions issued by these mechanisms achieve real-world impact. We emphasize that while the implementation of Commission recommendations and Court orders is one important way in which these decisions can have practical effect, this is certainly not the only means of achieving impact. We explore this point through case studies that highlight a number of ways in which activists may use international decisions as part of an integrated approach to domestic advocacy.

We then examine the ways in which the supervisory bodies of the Inter-American system have approached the enforcement of economic, social, and cultural rights to date. As we will see, both the Commission and the Court have confronted these issues in recent years. We argue that to the extent the Court and the Commission have been instrumental in advancing human rights in the Americas, they have achieved this through largely conventional interpretations of human rights norms that have allowed both bodies to maintain the respect of governments and activists.

Indeed, we urge activists to respect the dialectic nature of the relationship between civil society and the governments and institutions that make up the Inter-American system: civil society may seek enforcement of individual rights through recourse to Inter-American human rights protection mechanisms; yet the system depends on the support of civil society for its legitimacy.[2] Governments provide the required resources to keep the Inter-American system functioning and elect the individuals who will serve as commissioners and judges on its oversight bodies; but these institutions also depend on governments' voluntary acceptance of their authority and good-faith participation in

2. In the months leading up to the June 2004 General Assembly of the Organization of American States, for example, rights defenders throughout the Americas rallied to stave off efforts to reduce the operating budget of the Inter-American Commission on Human Rights. A coalition of some 93 entities argued that "Member States must rescind these [proposed] cuts and assume their prior responsibilities and commitments to progressively and substantially increase the budgets of human rights bodies." *See* Statement presented at the Thirty-Fourth Regular Session of the Organization of American States General Assembly by International Coalition of Organizations for Human Rights in the Americas, June 6–8, 2004, Quito, Ecuador, *available at* http://www.cejil.org/asambleas.cfm?id=153 (last visited Nov. 29, 2004).

the established rules of engagement in order to be effective. And the institutions comprising the system have the authority to resolve claims and to issue decisions requiring action on the part of both governments and civil society actors; but this authority depends on the latter two groups' perception that it is being exercised in a reasonable, appropriate manner.

As actors in this complex web of interdependent institutions, legal operators (i.e., lawyers, commissioners, and judges) seeking progressive transformation of Latin American reality must be mindful of their limited role in promoting economic, social, and cultural rights. It is vital here that our argument not be misconstrued. We do not suggest that human rights lawyers ought to accept gross inequality, nor that they limit their activism to the areas in which the Inter-American system may be used most effectively. Instead, we recommend that international human rights lawyers accept the limits inherent in litigation in the Inter-American system and seek alternative means of maximizing their impact in advancing the agenda of social justice. We outline methods—including defending the civil and political rights of leaders of social movements and filing and winning cases involving a limited set of economic, social, and cultural rights in conjunction with organized social movements—through which international human rights advocates may maximize their impact.

Similarly, we urge the Court and the Commission, as institutions, not to see themselves fundamentally as promoters of visionary jurisprudence but to encourage respect for human rights by acting primarily as adjudicatory and advisory bodies whose decisions and recommendations enable those defending economic, social, and cultural rights on the ground to promote concrete changes in state policy.

This Article is divided into four parts. Part I considers economic, social, and cultural rights in the Americas, examining the current socio-economic and political context as well as the historic development of these rights in the Inter-American system. That section analyzes the limited nature of access to the Inter-American Commission and Court and assesses the degree of compliance with the system's determinations. Part II evaluates the potential of international litigation to effect real-world change. That section begins by examining critiques of rights-based litigation as a means of achieving social justice in both the U.S. domestic and international contexts. It then continues by reviewing case studies from Brazil, Peru, and Trinidad and Tobago, seeking to draw conclusions about the circumstances in which international litigation is most effective. Part III analyzes international human rights jurisprudence, both in the Inter-American system and beyond, drawing out the conceptual differences between economic, social, and cultural rights and their civil and political counterparts. It then focuses on three possible bases for advancing legal protections for economic, social, and cultural

rights. Finally, Part IV focuses on areas for future development, positing both the legal arguments and the kinds of test cases we believe manifest the greatest potential to establish precedents likely to be implemented by states in the Americas.

I. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM

In the past twenty years, as Latin America has emerged from a period of intense struggle with civil wars, military dictatorships, and massive, state-sponsored human rights abuse, the terms of the principal human rights debates have undergone a dramatic shift. Civilian rule, periodic elections, and a vast reduction in targeted civil and political rights violations have marked the region for two decades. During the worst years of repression and in the immediate aftermath of systematic violations such as forced disappearances, extra-judicial executions, and torture, the Latin American human rights movement understandably focused on preserving the most basic civil and political rights—to life, to physical integrity, and to due process. In a new era of democratically elected governments, economic integration, and globalization, the movement has now turned its attention to the enforcement of economic, social, and cultural rights.[3]

At the same time, the transition to civilian rule has coincided with the fall of the Berlin Wall and the global advance of free market capitalism as the lone surviving economic model. This advance has displaced socialism, undermining the capacity of leftist discourse and projects to present alternatives to increasing inequality, widespread poverty, unemployment, substandard housing and other chronic forms of suffering. The combination of the shift to relatively stable civilian governments, the maintenance and intensification of widespread poverty, and the demise of the promise of leftist politics as a means of social transformation has provoked significant change in human rights discourse and practice as activists increasingly have embraced economic, social, and cultural rights to respond to Latin America's chronic social problems. With this shift has come a host of new challenges. Activists and policymakers have grappled with legal and political structures—both at the domestic and international levels—incapable of imposing immediate obligations on states to protect and ensure economic, social, and cultural rights.

A broad consensus has gradually emerged, affirming the need for

3. *See, e.g.*, Paulo Sérgio Pinheiro, *The Rule of Law and the Underprivileged in Latin America: Introduction*, *in* (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA (Juan E. Méndez et al. eds. 1999) (arguing that in transitional democratic states in Latin America, social class has transcended political affiliation as the key factor in rights enjoyment and deprivation).

increased "justiciability" of economic, social, and cultural rights. This consensus has led to a proliferation of efforts by non-governmental organizations, declarations by intergovernmental organizations, and determinations by international adjudicatory and semi-judicial bodies that seek to expand, often by mere affirmation, the scope of justiciability of economic, social, and cultural rights.

The idea of economic, social, and cultural rights has been recognized alongside civil and political rights since the establishment of basic human rights principles in the Universal Declaration of Human Rights.[4] This idea has been reiterated in the International Covenant on Civil and Political Rights,[5] the International Covenant on Economic, Social and Cultural Rights,[6] and, in the Americas, in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the "Protocol of San Salvador").[7] While early iterations of human rights underscored fundamental differences between civil and political rights on the one hand and economic, social, and cultural rights on the other, recent instruments and declarations have sought to minimize these differences.[8] Indeed, official international discourse has increasingly supported the idea that human rights are interdependent and indivisible, and that economic, social, and cultural protections are no less rights than their civil and political counterparts. Nonetheless, the most fundamental economic, social, and cultural rights of the four-fifths of humanity that live in dire poverty are disregarded on a daily and massive basis.

Latin American nations—in discourse, at least—widely accept that international legal norms on human rights exist and that they bind states.[9] In theory, economic, social, and cultural rights are no exception; yet achieving the justiciability and exigibility of these rights has been more difficult, largely due to the broadly criticized but still prevalent idea that civil and political rights require mere non-interference by the state,

4. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, at 71, U.N. Doc. A/810 (1948).

5. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 135, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966) (entered into force Mar. 23, 1976).

6. *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 993 U.N.T.S. 3 (1966) (entered into force Jan. 3, 1976).

7. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador,"* Inter-Am. C.H.R. 67, OEA/ser. L./V./II.82, doc. 6 rev.1 (1992) (hereinafter *Protocol of San Salvador*).

8. *See, e.g., Vienna Declaration and Programme of Action*, U.N. World Conference on Human Rights, U.N. Doc. A/CONF.157/24 (1993) ("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.").

9. A number of Latin American nations have stipulated the binding nature of international human rights norms in their constitutions or in other sources of domestic law. *See infra* Part I.A.3.

while economic, social, and cultural rights demand positive state action. Scholars have criticized this distinction as overly simplistic, stressing the mixed nature (omission and action) of all rights, and in so doing have set out approaches that allow for the justiciability and exigibility of at least some economic, social, and cultural rights.

A. Economic, Social, and Cultural Rights in the Inter-American System for the Protection of Human Rights

1. *Historical Development*

In May 1948, seven months before the United Nations General Assembly approved the Universal Declaration of Human Rights,[10] the Organization of American States ("OAS") approved the American Declaration of the Rights and Duties of Man (the "American Declaration").[11] That instrument set forth a series of fundamental human rights—both civil and political, and economic, social, and cultural. In so doing, the OAS juxtaposed alongside the "traditional" fundamental rights to life, liberty, equality, and suffrage, the rights to education (Article XII), culture (Article XIII), work (Article XIV), and even social security (Article XVI).

But the Inter-American system lacked a binding treaty in the area of human rights until 1969, when the OAS member states approved the American Convention on Human Rights.[12] While the American Convention clearly constituted an advance in the defense of human rights in the Americas, in that it provided treaty-level protection to principles previously contained only in non-binding declarations, it also represented a retreat from the broader vision of human rights championed by the American Declaration. The Convention, unlike the Declaration, failed to afford economic, social, and cultural rights the same degree of specificity that had been established in the May 1948 Declaration. Indeed, the entire topic of economic, social, and cultural rights in the American Convention is reduced to a single article, Article 26. That article, entitled "Progressive Development," establishes that:

> The States Parties undertake to adopt measures, both internally and

10. Universal Declaration of Human Rights, *supra* note 4.

11. American Declaration of the Rights and Duties of Man ("The American Declaration"), O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser. L.V/II.82, doc. 6 rev. 1, at 17 (1992).

12. American Convention on Human Rights ("Pact of San José, Costa Rica"), Nov. 22, 1969, 1144 U.N.T.S. 123 (hereinafter Am. Conv. H.R.). Although the American Declaration established a long list of rights, it is not a legally binding treaty, as we discuss below in footnote 31 and accompanying text. For an overview of the governing human rights instruments of the OAS, including a discussion of the way in which such instruments become binding, see Tara Melish, Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims 3–23 (2002).

> through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.[13]

As we shall see, while this provision mentions economic, social, and cultural rights explicitly, it has proven ineffectual as a basis for individual claims. Indeed, Article 26 fails to establish any specific rights or concrete duties. As we discuss in our review of recent cases, this principle has been affirmed by the Court[14] and represents the dominant, though not unanimous, view of Article 26 among governments, members, and staff of the Inter-American Commission, and petitioning non-governmental organizations ("NGOs"). Expressing the dominant interpretation of the practice of the Inter-American system prior to the recent entry into force of the San Salvador Protocol, scholar and Inter-American Court of Human Rights Justice Antônio Augusto Cançado Trindade has written, "a gap in the protection of economic, social, and cultural rights has remained in the international treaty system in the Americas because Article 26 of the Convention limits itself to the 'progressive development' of these rights."[15]

The Inter-American system's failure to provide protection for economic, social, and cultural rights is contrasted by its active defense of civil and political rights. In addition to its other functions,[16] the

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13. Am. Conv. H.R., *supra* note 12, art. 26.

14. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

15. ANTÔNIO AUGUSTO CANÇADO TRINDADE, TRATADO DE DIREITO INTERNACIONAL DOS DIREITOS HUMANOS 365–66 (Sergio Antonio Fabris ed. 1997). The original text of the citation reads, "[n]o continente americano . . . persistiu . . . a lacuna no sistema interamericano de proteção no tocante aos direitos econômicos, sociais e culturais, porquanto a Convenção . . . se limitou a dispor (artigo 26) sobre o 'desenvolvimento progressivo' destes últimos."

16. Article 41 of the American Convention on Human Rights sets forth the Commission's functions:

> The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:
>
> to develop an awareness of human rights among the peoples of America;
>
> to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
>
> to prepare such studies or reports as it considers advisable in the performance of its duties;
>
> to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
>
> to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
>
> to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

Commission has, since its creation in 1959, reviewed, processed, and reached conclusions regarding thousands of individual petitions alleging violations of fundamental human rights.[17] The Court, through its advisory opinions and, since 1986, through its work on contentious cases, has adjudicated cases of rights abuse on a more limited scale, rendering justice to individual victims and establishing important precedents.

A 1999 compilation on economic rights prepared by the Inter-American Institute of Human Rights concludes:

> To date, the effectiveness of the inter-American system in protecting economic, social and cultural rights has been practically nil. This assertion applies ... [to countries] across the Americas, among other reasons because human rights protection organs have focused, over the past several decades, on the massive and systematic human rights violations that occurred in the context of the military dictatorships that nearly all Latin American countries suffered.[18]

This gap in the protection of economic, social, and cultural rights was filled—in part—by the Additional Protocol in the Area of Economic, Social and Cultural Rights, known as the "San Salvador Protocol."[19] The treaty, drafted over a period of years and completed in 1988, sets out a series of economic, social, and cultural rights. Among them are the right to work (Article 6); the right to just and equitable conditions of work (Article 7); labor rights (Article 8); the right to social security (Article 9); the right to health (Article 10); the right to a healthy environment (Article 11); the right to food (Article 12); the right to education (Article 13); the right to the benefits of culture (Article 14); the right to protection of families (Article 15); the rights of children (Article 16); and the protection of the elderly (Article 17) and the handicapped (Article 18).

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to submit an annual report to the General Assembly of the Organization of American States.

Am. Conv. H.R., *supra* note 12, art. 41, at 193.

17. Even prior to the adoption of the American Convention, which established the functions of the Commission, this body received and processed complaints of human rights protected by the American Declaration. OAS General Assembly Resolution No. XXII, 721 U.N.T.S. 324, and the 1967 Protocolo de Buenos Aires, OAS Treaty Series, No. 1-A, conferred authority on the Commission to process individual petitions much as it had been doing on a *de facto* basis shortly after its creation in 1959.

18. INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS, LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES: UN DESAFÍO IMPOSTERGABLE 19–20 (San José, Costa Rica 1999) (authors' translation). The original Spanish text reads:

> [H]asta el momento la real efectividad del sistema interamericano para proteger los derechos económicos, sociales y culturales ha sido prácticamente nula. Esta afirmación es aplicable ... [a los países] del continente americano, entre otras razones debido a que la atención de los órganos de protección durante las pasadas décadas estuvo centrada en masivas y sistemáticas violaciones a los derechos humanos, ocurridas en el marco de las dictaduras militares sufridas por gran parte de los países latinoamericanos.

19. *Protocol of San Salvador*, *supra* note 7.

The San Salvador Protocol specifically provides for petition to the Inter-American Commission to enforce the right to education, protected in Article 13, and of certain labor rights, established in Article 8, clause (a). Article 19, clause (6) states that:

> Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a state party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.[20]

The negative inference of the language used in Article 19 is that the violation of other rights enshrined in the Protocol *does not* give rise to the right of petition to the Inter-American system. Although petitioners to the Commission have sought to defend the justiciability of *all* of the rights protected in the Protocol, the Commission has construed Article 19 restrictively.[21]

2. *Judicial and Quasi-Judicial Oversight in the Inter-American System*

The OAS has created and developed a human rights system composed of two oversight bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Commission, created in 1959, is a quasi-judicial body that promotes human rights through a series of functions that go well beyond the adjudication of individual cases. The Court, established by the American Convention on Human Rights, is a purely legal body charged with jurisdiction over individual disputes (contentious jurisdiction). The Court also has the power to issue advisory opinions at the request of member states of the OAS, the Commission, and other OAS bodies, and to issue provisional measures for the urgent protection of individuals it deems to be at imminent risk of violation of one or more protected rights.[22]

Among the functions of the Commission is the receipt and processing of individual petitions alleging violations of the rights guaranteed in the Inter-American system. For those in the Americas whose human rights have been violated, petition to the Commission is often the most effective means of seeking a remedy at the international level. In order to file a petition with the Commission, victims must first exhaust domestic remedies.[23] This petition begins a process of litigation before the Commission, which may lead to transfer of the case to the

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20. *Protocol of San Salvador*, *supra* note 7, art. 19.

21. *See* Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01 para. 35–36, OEA/ser. L./V./II.111, doc. 20 rev. (2000).

22. *See* Am. Conv. H.R., *supra* note 12, Ch. VIII.

23. Petitioners may request exemption from this requirement in a limited set of circumstances.

Inter-American Court. Before the Court, the Commission is transformed from arbiter to party, becoming the petitioner against the state. Until recently, the Commission was the primary representative of the original petitioner's interests before the Court, but with the entry into force of recent modifications in the Court's Rules of Procedure, victims may now be represented by an individual or organization of their choice, who may present independent evidence and arguments to the Court, alongside the Commission.

a. *The Inter-American Commission on Human Rights*

The Inter-American Commission on Human Rights is composed of seven members selected by the Organization of American States who meet two or three times per year, for periods of two to three weeks.[24] During these sessions, the members of the Commission review and approve reports relating to cases that have been submitted by individuals or NGOs alleging specific violations of rights enshrined in the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and various other Inter-American instruments.[25] In addition, the Commission undertakes to resolve structural human rights issues through a number of other activities, including observation and reporting on general human rights conditions in member states, which may include on-site visits and collaboration with local entities and governmental agencies; the publication of reports on specific human rights issues where it deems appropriate; and the organization of conferences, seminars, and meetings with representatives of governments, NGOs, academic institutions, and other groups.[26]

In theory, petition to the Inter-American Commission is open to all residents and rights groups in any member state of the OAS. But of the

24. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THE RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, tit. I, ch. V., art. 14, *available at* http://www.cidh.oas.org/basicos/basic16.htm (updated Oct. 2003) ("The Commission shall hold at least two regular periods of sessions per year for the duration previously determined by it and as many special sessions as it deems necessary.").

25. The Commission is empowered to adjudicate cases against any of the OAS member states, including those that have not ratified the American Convention. In the event the state charged has not ratified the Convention, the Commission applies the human rights principles set forth in the American Declaration of the Rights and Duties of Man, applicable to all member states by virtue of their membership in the OAS. In addition to the aforementioned *Protocol of San Salvador*, applicable human rights instruments include the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; the Inter-American Convention to Prevent and Punish Torture; the Inter-American Convention on the Forced Disappearance of Persons; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"); and the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities. *See* Am. Conv. H.R., *supra* note 12.

26. As mentioned above, Article 41 of the Convention sets forth the Commission's functions. *See also* Legal Bases and Activities of the IACHR During 2003, Inter-Am. C.H.R., ch. II, OEA/Ser.L/V/II.118, doc. 5, rev. 2, *available at* http://www.cidh.org/annualrep/2003eng/chap.2.htm (description of the Commission's legal bases, functions, and powers).

hundreds of petitions the Commission receives each year, it decides fewer than sixty matters, roughly half of which concern the admissibility of the petition itself. These numbers demonstrate a critical characteristic of the Inter-American system: it is one of limited access and one of even more limited use in terms of obtaining binding, final decisions.

It is important to note that the Commission's role in shaping the policies and practices of member states is through the issuance of *recommendations*. Commission resolutions are not binding in the same sense as determinations by the Court, although states do have a good-faith duty to accept and implement the Commission's recommendations.[27] Nonetheless, states can and often do reject these recommendations, either explicitly or by failing to take measures to ensure their implementation.

In sum, Commission reports are political instruments that may (or may not) be effective as tools to pressure, persuade, or coerce states to effect internal policy changes; but their compulsory effect on states is limited, and, in isolation, tend to be only moderately effective in bringing about meaningful change, as we will discuss in later sections.

b. *The Inter-American Court of Human Rights*

Created in 1978 on the entry into force of the American Convention, the Inter-American Court focused almost exclusively on advisory opinions until 1986, when the Commission submitted the first contentious cases to the Court.[28] From its inception through the end of 2004, the Court has published just 119 decisions in contentious matters and nineteen advisory opinions. Of the decisions issued in contentious matters, many refer to different procedural stages of the same case.

If the Commission is an organ of limited access, the Court is an instance of *extremely* limited access. To begin with, the seven judges of the Court[29] generally convene for regular sessions three or four times a year, for a total of approximately eight weeks. In comparison to the Commission's staff of some two dozen attorneys, the Court depends on only four senior and four junior attorneys to prepare draft reports and to assist the Judges in their duties, thus limiting its productivity, at least in numerical terms.

27. The Inter-American Court of Human Rights has observed that, "the report or resolution of the Commission does not have those binding effects. Its intervention is intended to enable it, on the basis of good faith, to obtain the State's cooperation." Ad. Op. OC-15, Inter-Am. Ct. H.R. (ser. A) para. 28 (1997).

28. Velásquez-Rodríguez v. Honduras (Preliminary Objections), Inter-Am Ct. H.R. (ser. C) No. 1 (1987); Fairén-Garbi and Solís-Corrales v. Honduras (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) No. 2 (1987); Godínez-Cruz v. Honduras (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) No. 3 (1987).

29. The selection of judges is guided by Articles 52–53 of the American Convention. Am. Conv. H.R, *supra* note 12, arts. 52–53.

Aggravating the structural barriers to widespread access is the specialized nature of supranational litigation. Because petitioning the Inter-American system requires knowledge of a particular body of substantive and procedural law, very few advocates have made use of its case resolution capacity, and those who have tend to be repeat players. In Part II, we address critiques by critical legal studies scholars and others who have argued that "queue jumping" through litigation undermines efforts at distributive justice. To the extent that access to the Inter-American system is concentrated in the hands of a small group of practitioners, these concerns intensify.

Finally, the Court's authority to issue compulsory judgments is contingent on the states' voluntary recognition of the Court's jurisdiction, and not all member states have accepted jurisdiction. At this writing, twenty-two states have recognized the Court's jurisdiction to resolve contentious matters.[30] But while formal recognition of the Court's jurisdiction is a necessary condition for the state to be bound by the Court's orders, it is not necessarily a sufficient one for the practical and effective implementation of such orders.

3. *Implementation of Commission Recommendations and Court Decisions*

The international obligations that states assume upon joining the Organization of American States and ratifying the American Convention on Human Rights include the duty to respect the rights set forth in the American Declaration of the Rights and Duties of Man and in the American Convention. As a formal matter, the American Declaration is not directly binding on states, as it does not have the status of a treaty according to the Vienna Convention on the Law of Treaties (1969).[31] Both the Commission and the Court, however, have interpreted the Declaration as indirectly binding on all member states by virtue of their ratification of the OAS Charter, which *is* a legally binding treaty and

30. The states are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago has repudiated its ratification of the Convention, however, effective May 26, 1998. Three additional countries, Dominica, Grenada, and Jamaica, have signed and ratified the American Convention but do not recognize the jurisdiction of the Court. The United States is a signatory to the Convention but has not ratified it, nor has it recognized the Court's contentious jurisdiction.

31. The Inter-American Court has explicitly held that

> "the Declaration is not a treaty as defined by the Vienna Conventions because it was not approved as such. . . .
>
> . . . It was neither conceived nor drafted as a treaty. . . . [T]he Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty. . . ."

Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, OC-10 Ad. Op., Inter-Am. Ct. H.R. (ser. A) para. 33–34 (1989).

which establishes state obligations regarding human rights with reference to the American Declaration.[32] The American Convention itself has the status of a treaty and is therefore directly binding on all states that have ratified it. The Convention has been ratified by the majority of the OAS member states (notable exceptions being the United States, Canada, and Cuba), including all Latin American nations, with the exception of Cuba.

According to the first two Articles of the Convention, states have a duty to "respect" and "ensure the free and full exercise of"[33] the rights and freedoms enumerated in the Convention and to "undertake to adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms."[34] The Commission has interpreted these obligations as imposing a duty on states to comply with Commission recommendations. In its 1997 Annual Report, the Commission explicitly urged states to "comply with the recommendations made by the Commission in its reports on individual cases and to abide by the requests of provisional measures."[35] The Commission wrote:

> The Inter-American Court has indicated that States parties to the American Convention have the obligation to adopt the recommendations issued by the Commission in its reports on individual cases, in the light of the principle of good faith. This obligation extends to the member States in general, provided that, pursuant to the OAS Charter, the Commission remains one of the main organs of the Organization with the function of promoting the observance and defense of human rights in the hemisphere.
>
> Accordingly, the Commission urges the member States, whether they are parties to the American Convention or not, to fulfill their international obligations by following the recommendations issued in the reports on individual cases and abiding by the requests of provisional measures.[36]

The Commission further invited member states "to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere."[37] To date, a handful of American

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32. *Id.* para. 45.

> For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

Id.; *see also* Roach & Pinkerton, Case 9647, Inter-Am. C.H.R., Resolution No. 3/87, paras. 44–49, OEA/ser.L./V./II.71, doc. 9 rev. 1 (1987).

33. Am. Conv. H.R., *supra* note 12, art. 1(1), at 166.

34. *Id.* art. 2.

35. Annual Report 1997, Inter-Am. C.H.R., ch. VII, para. 12, OEA/Ser.L/V/II.98, doc. 6 rev. (1998).

36. *Id.*

37. *Id.* para. 13.

states have established special mechanisms or laws to facilitate the implementation of Commission recommendations and/or Court decisions. While it is important to emphasize that the creation of such mechanisms does not necessarily ensure the effective application of Inter-American decisions, such efforts represent an important step toward creating conditions in which such decisions can have practical impact. Below, we cite several examples highlighted in a recent report by the Center for Justice and International Law.[38]

- An agreement between Costa Rica and the Inter-American Court establishes that resolutions issued by the Court or by its President, upon transmission to domestic administrative and judicial authorities, will have the same effect as sentences handed down by the domestic judiciary.[39]

- Colombia's Law 288/96 establishes a mechanism to require the Government to pay damages resulting from human rights violations established by decisions of the Human Rights Committee of the International Covenant on Civil and Political Rights and/or the Inter-American Commission of Human Rights.[40] An important aspect of Law 288 is that it authorizes the application of the procedure even where the applicable limitations period to obtain damages under domestic law has expired.[41] As a result, the statutory limitations that have been one of the primary factors resulting in impunity have been rendered ineffective. Colombia's Government is actively using this mechanism.

- Peru's habeas corpus and constitutional *amparo* law[42] recognizes the obligatory nature of decisions issued by the Inter-American oversight bodies.[43] Article 40 of that law provides for implementation and compliance with international resolutions and establishes that the validity of international resolutions is not contingent on domestic recognition or review.[44] The Peruvian Supreme Court receives resolutions issued by international bodies and orders their execution according to applicable domestic norms and procedures.

- Article 15 of Honduras' 1982 Constitution states that "Honduras makes its own the principles and practices of international law aimed at human solidarity, respect for people's self-determination, non-

38. *See* CENTER FOR JUSTICE AND INTERNATIONAL LAW, UN-KEPT PROMISES: THE IMPLEMENTATION OF THE DECISIONS OF THE COMMISSION AND THE COURT, GAZETTE NO. 10, *available at* http://www.cejil.org/gacetas.cfm?id=17 (in Spanish). Except where otherwise noted, the CEJIL report was the source of all information summarized in these bullet points.

39. *Id.*

40. Ley 288 de 1996, Diario Oficial, Ano CXXXII, N. 42826., Julio, 1996., Pag. 1, *available at* http://www.bernateygamboa.com/espanol/textos_disponibles/leyes/LEY288_96.htm.

41. *Id.* para. 4

42. Ley No. 23506, Ley de Habeas Corpus y Amparo, *available at* http://www.uc3m.es/uc3m/inst/MGP/JCI/02-peru-leyhabeascorpusyamparo.htm.

43. It should nonetheless be noted that Peru systematically failed to comply with Commission recommendations and repudiated the Court's jurisdiction under the Fujimori administration. It has since retracted its repudiation and has improved compliance with Court Decisions. *See infra* Part III.B.

44. Ley No. 23506, Ley de Habeas Corpus y Amparo, *supra* note 42, art. 40.

> interference, and support for universal peace and democracy. Honduras proclaims as unavoidable the validity and mandatory execution of international arbitral and judicial decisions."[45]
>
> • Article 23 of Venezuela's 1999 Constitution affords constitutional status to all human rights accords, treaties and conventions signed and ratified by Venezuela, which are thus hierarchically superior to the domestic law of that country, on par with the Constitution itself.[46]
>
> • The Constitutions of Argentina, Brazil, Chile, Colombia, Guatemala, Nicaragua, and Peru all make explicit reference (in the form of a renvoi) to the rights enshrined in human rights treaties and conventions to which the state is a party.[47] Article 75, section 22 of Argentina's Constitution provides that the American Declaration and the American Convention, among other international treaties, are "hierarchically superior to laws."[48]

While such measures are, without question, insufficient to guarantee the effective implementation of decisions of the Inter-American supervisory bodies, they nonetheless create mechanisms that activists may call upon as part of their broader advocacy work. We will return to this point later when we examine the ways in which social movements have used such mechanisms to put pressure on governments to implement change.

In 2001, the Commission began including in its annual reports a summary of the status of compliance with its recommendations. The most recent annual report published at this writing (2003) provides a table with cumulative data on compliance from the preceding three years.[49] While the Commission notes that compliance "is meant to be successive and not immediate and that some recommendations require a reasonable time to be fully implemented," the table evidences a bleak record overall. Of the sixty cases studied, the Commission found total

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45. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, art. 15 (authors' translation), *available at* http://www.honduras.net/honduras_constitution.html. The original Spanish text reads:

> Honduras hace suyos los principios y prácticas del derecho internacional que propenden a la solidaridad humana, al respecto de la autodeterminación de los pueblos, a la no intervención y al afianzamiento de la paz y la democracia universales.
>
> Honduras proclama como ineludible la validez y obligatoria ejecución de las sentencias arbitrales y judiciales de carácter internacional.

46. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 23. The original Spanish text reads, "Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio mas favorable a las establecidas por esta Constitución y la ley de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público."

47. Antônio Augusto Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. COMP. & INT'L L. 5 (2000).

48. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 75, § 22.

49. ANNUAL REPORT 2003, Inter-Am.C.H.R., ch. III, para. 76, OEA/ser. L./V/II.118, doc. 5 rev. 2 (2003).

compliance in just five; partial compliance, i.e., "those cases in which the state has partially observed the recommendations made by the [Commission] either by having complied with only one or some of them or through incomplete compliance with all of them,"[50] in twenty-nine; and pending compliance, i.e. "those cases in which the [Commission] considers that there has been no compliance with the recommendations because no steps have been taken in that direction; because the state has explicitly indicated that it will not comply with the recommendations made; or because the state has not reported to the [Commission] and the Commission has no information from other sources that would suggest otherwise,"[51] in twenty-six.

Similarly, the Inter-American Court has issued a number of Resolutions on compliance, though in a less systematic fashion than the Commission. Most recently, during its regular sessions held in November 2003, the Court issued fifteen resolutions regarding compliance with sentences that had been issued as many as six years earlier. For example, in the *Caballero Delgado and Santana* case,[52] in which the Court ordered the State of Colombia to make reparations to the victims in 1997, compliance with the majority of the measures ordered was still pending as of November 2003.

An analysis of these resolutions suggests that states generally comply with Court orders to pay monetary damages and costs to victims and/or their next of kin, and sometimes comply with orders to make symbolic reparations, such as naming public parks, schools, or streets after victims or making a public apology or statement of responsibility for violations.[53] In addition, states sometimes report taking steps to investigate the crimes alleged and to punish the individuals responsible, and/or taking steps to modify internal legislation to comply with international human rights standards. It is important to note, however, that these latter types of measures are rarely complied with in full. Some states, such as Peru during the years of Fujimori's rule, systematically disregarded orders of this nature,[54] while others allege inability under domestic law to comply[55]

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50. *Id.*

51. *Id.*

52. Caballero Delgado and Santana Case, Inter-Am. Ct. H.R. (ser. C) No. 22 (1995).

53. *See., e.g.*, Benavides Cevallos v. Ecuador (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), *available at* http://www.corteidh.or.cr/index_ing.html; Cantoral Benavides v. Peru (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), *available at* http://www.corteidh.or.cr/index_ing.html.

54. *See* CENTER FOR JUSTICE AND INTERNATIONAL LAW, *supra* note 38.

55. In its resolutions on compliance, the Court expressly held that

> pursuant to the treaty obligations assumed by the States, no provision of domestic law, including the statute of limitations, may be invoked to fail to comply with the decisions of the Court concerning the investigation and punishment of those responsible for human rights violations. Otherwise, the rights embodied in the American Convention would be deprived of effective protection. This understanding of the Court is in accordance with the letter and the spirit of the Convention and also general principles of law; one of these

or report only partial compliance (for example, taking preliminary steps to investigate crimes, or prosecuting one of several alleged perpetrators).[56] In other instances, states may simply fail provide any information to the Court, either entirely or with respect to particular measures.[57]

II. THE IMPACT OF INTERNATIONAL LITIGATION: ANALYSIS AND CASE STUDIES FROM THE AMERICAS

Scholars and practitioners have devoted far more energy to the study of jurisprudential aspects of the decisions of the Inter-American human rights system than to assessing the degree to which these decisions are implemented in practice. Yet it is precisely the implementation of decisions and the impact of international oversight on the degree of respect for human rights that should matter most to the human rights community.

While international human rights practitioners seek to ensure that international oversight bodies issue favorable decisions in individual cases, they must also work to ensure that those sentences are implemented. Further, resort to international oversight mechanisms is ordinarily motivated by the desire to affect human rights practices through changes in policy, and therefore aspires (or should aspire) to more than merely achieving results in individual cases. The effect of decisions in particular cases, the degree to which these decisions themselves are implemented, and the connection between individual cases and broader policies are thus topics that should be of vital importance to international human rights practitioners. It should be obvious to those involved in litigating and resolving individual cases in the Inter-American system that the resulting decisions are, at best, one element in a broad web of factors that may promote social change.

Yet, in practice, international human rights litigators frequently ignore the broader web of factors. Faced with massive social inequity, human rights lawyers in the Americas often construct sophisticated legal

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principles is that of *pacta sunt servanda*, which requires that the provisions of a treaty should be ensured *effet util* at the level of the domestic law of the States Parties.

Benavides Cevallos v. Ecuador (Compliance with Judgment), Inter-Am. Ct. H.R. para. 20 (2003), *available at* http://www.corteidh.or.cr/index_ing.html. In the cases in which the Court ordered compliance resolutions on November 27, 2003, Colombia, Ecuador, and Peru all reported inability under domestic legislation to comply with one or more of the Court's reparations orders. *See id.*; Cantoral Benavides v. Peru (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), *available at* http://www.corteidh.or.cr/index_ing.html; Caballero Delgado v. Colombia (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), *available at* http://www.corteidh.or.cr/index_ing.html.

56. *See, e.g.*, Blake v. Guatemala (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), *available at* http://www.corteidh.or.cr/index_ing.html.

57. *See, e.g.*, Hilaire v. Trinidad and Tobago (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), *available at* http://www.corteidh.or.cr/index_ing.html.

arguments that cast particular instances of social injustice in the language of state obligations and enforceable, individual rights—the currency of international human rights litigation. Moreover, the lawyers, commissioners, and judges responsible for resolving these claims may view individual decisions as an opportunity to establish visionary jurisprudence, and may respond positively to this approach. But such a strategy has a number of drawbacks. As we argue, practitioners must recognize the potential for counterproductive results, either due to overreaching, leading to decisions unlikely to be enforced, or to excessive emphasis on rights-based approaches to the detriment of other, potentially more effective means of seeking change. Practitioners should realize that, like any tool, litigation of cases is useful in some instances but is less useful—and, in fact, may even be counterproductive—in others.

Indeed, scholars of U.S. domestic practice have critiqued individual, rights-based litigation as a means of effecting systemic change. These scholars observe that rights-based approaches unfairly allow some members of communities of victims to "queue jump."[58] They also raise fundamental doubts as to the effectiveness of litigation, in addition to its potential to demobilize social movements and to strengthen the state (or by analogy, the international oversight body) while fostering dependence on attorneys. Their critiques consider rights-based approaches generally,[59] as well as specific areas such as women's rights,[60] race

58. As David Kennedy argues:

> A right or entitlement is a trump card. In emancipating itself, the right holder is, in effect queue jumping. But recognizing, implementing, and enforcing rights is distributional work. Encouraging people to imagine themselves as right holders, and rights as absolute, makes the negotiation of distributive arrangements among individuals and groups less likely and less tenable. There is no one to triage among rights and right holders—except the state. The absolutist legal vocabulary of rights makes it hard to assess distribution among favored and less-favored right holders and forecloses development of a political process for trade-offs among them, leaving only the vague suspicion that the more privileged get theirs at the expense of the less privileged.

DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 17 (2004).

59. Critical legal scholar Peter Gabel and attorney Paul Harris have argued that "an excessive preoccupation with 'rights-consciousness' tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves." Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L & SOC. CHANGE 369, 375 (1982–83); Hutchinson and Monahan have noted that "[i]n constructing elaborate schemes of legal rights and entitlements . . . mainstream legal theorists simply justify the prevailing conditions of social life and erect formidable barriers to social change." Allan Hutchinson & Patrick Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 209 (1984).

60. Some left feminist critics have questioned the campaign for pay equity on the basis that the "legalistic, equal-rights-based strategy" has done more to reinforce an existing ideology that protects privilege than to effect change based on distributive justice. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 228 (1994). These critics argue that the

relations,[61] and environmental justice.[62] Similar criticisms have been lodged in the supranational realm. For example, a recent article by Michael J. Dennis and David P. Stewart argues that:

> [I]nternational adjudication offers a dubious route toward economic and social progress. In any event, it is certainly not the only or even the best means of holding governments "accountable" for their human rights obligations. . . . At the international level, efforts to articulate a single approach to the promotion and achievement of economic, social, and cultural rights are bound to fail, given the vastly differing circumstances in which states parties find themselves. . . . We fear that instead of advancing respect for, and implementation of, economic, social, and cultural rights in states parties that to date have given them short shrift, there is a significant risk that trying to "enforce" such rights through binding international adjudication will have the opposite result, causing states to deemphasize them and further undermining their stature and acceptability.[63]

Dennis and Stewart contend that "[t]he call for formal, binding, case-by-case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial or quasi-judicial processes intrinsically produce better, more insightful policy choices than, for

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struggle for pay equity fails to challenge the larger "hegemonic liberal political discourse" with the result that activists "court the danger of strengthening the ideological and social underpinnings of women's subordination." *Id.* (quoting Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, *in* WOMEN, CLASS AND THE FEMINIST IMAGINATION, 491, 500 (Karen V. Hansen & Ilene J. Philipson eds. 1990)).

61. Commentators have noted that "[w]hile Critical Race theorists share the disenchantment of Critical Legal Studies with rights jurisprudence, they also recognize the important historical and social role that rights approaches have played in the liberation of persons of color." Darren L. Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 632 (2003). Patricia Williams has explored the black community's simultaneous embrace and skepticism of the concept of rights, observing that, "[t]o say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before." Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987). Roy Brooks has argued that the focus on the enforcement of formal equality between blacks and whites has resulted not only in the movement's failure to achieve substantive equality, but also in the exacerbation of problems affecting the African-American community as a group. *See e.g.*, ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990). Brooks argues that the focus on equality of opportunity has enabled African Americans in the highest economic and social classes to access education, housing and employment opportunities previously restricted to whites. Brooks contends that middle class and working class African Americans, however, have been left behind in communities whose leaders have abandoned them for social mobility. Brooks' solution focuses on the need for a massive program of African American self-help.

62. Luke Cole has argued that litigation places the attorney in a position of control vis-à-vis those affected by environmental abuse and insists that "[t]he lawyer who wants to serve pollution's victims must put her skills to the task of helping those people organize themselves." Luke W. Cole, *Empowerment as the Key to Environmental Law: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 649 (1992). Cole also questions whether courtrooms are the most advantageous place for poor victims of environmental injustice and whether winning may be counterproductive.

63. Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?*, 98 AM J. INT'L L. 462, 467 (2004).

example, their legislative counterparts."[64] They base their bleak view of the prospects offered by international adjudication of economic, social, and cultural rights on their view of a series of factors, including the limited capacity of the oversight body, costs involved in litigation, and the likely failure of states to comply with decisions in individual cases.[65]

The critique offered by Dennis and Stewart may well be accurate insofar as it seeks to challenge the notion that an individual complaints mechanism for economic, social, and cultural rights can, by itself, transform societies by effectuating wide scale social justice, economic redistribution, or the like. We agree that no supranational litigation mechanism offers such vast promise. This critique is consistent with our position that economic, social and cultural rights are best advanced through integrated advocacy strategies, including litigation focused on civil and political rights. But the incapacity of supranational litigation to resolve all problems in a given area or to supplant other valuable means of effecting change does not render it of no use.

Notwithstanding the Dennis-Stewart critique, scholars such as Martha Minow have argued—and we agree—that while rights-based litigation of individual cases is insufficient to bring about social change, it can be a valuable tool as part of a "mass movement[] with legislative, regulatory and protest dimensions."[66] Furthermore, in the context of international human rights litigation, additional factors, specific to the role of international oversight mechanisms, offset the tension that exists in the domestic context between rights-based litigation and grassroots social movements. These factors involve the mobilizing power within countries that is afforded to the intelligent use of international oversight mechanisms.

In varying degrees, states in the Americas (and in the rest of the world) legitimate themselves through their insertion in international organizations, structures and discourse.[67] This internal legitimization process can empower actors—whether social movements, NGOs, or lawyers—to the extent they are able to tap into the strength of international networks and intergovernmental oversight bodies. As the case studies below demonstrate, the force of oversight bodies goes far beyond their legal powers, which are rarely, if ever, what matters most

64. *Id.* at 466.

65. *Id.*

66. Martha Minow, *Law and Social Change*, 62 UMKC 171, 173 (1993). As Minow notes, litigation is frequently used as a means to an end. "Many contemporary reformers file test case lawsuits with the goal of gaining a place on the evening news and influencing legislative agendas, regardless of whether or not they prevail in court." *Id.* at 173 (citing NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980'S AND BEYOND (1989)).

67. *See generally* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, forthcoming, 54 DUKE L.J. (2004); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003).

within the country whose abuses are subject to adjudication. It is the fact of international rebuke or condemnation that is of greatest import to those seeking to challenge state abuses within a given country. And those seeking to challenge the state often include trade unions, student movements, women's organizations, landless peasants, prisoners' rights groups, etc. These social movements may thus be empowered by international litigation rather than marginalized by it. Indeed, as we recommend in this article, when international human rights advocacy is carried out most effectively—that is, *jointly* with social movements and focusing on areas that will strengthen efforts to transform unjust elements of particular societies—the "queue-jumping" tensions dissipate.[68]

Insofar as international litigation resembles the context critiqued by some critical legal studies scholars—that is, in which lawyers are isolated from, rather than collaborate with, social movements—it is indeed likely to be ineffective. Yet if practitioners envision supranational litigation as merely one element among many of an integrated advocacy strategy, and if they work jointly with social movements, they may avoid the dangers observed by critical legal studies in the domestic context.

Douglass Cassel has captured this idea with the following image:

> What pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.[69]

Although Cassel does not address economic, social, and cultural rights in his analysis,[70] we believe that international human rights law can be an important tool for the expansion of economic, social, and cultural rights in the Inter-American system. As he notes:

> [I]nternational human rights law has shown itself to be a useful tool for rights protection. Most important are its indirect effects. International articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press. International human rights law also facilitates international and transnational processes that reinforce, stimulate, and monitor these

68. The sense of litigation as "queue jumping" is clearly present in the case of supranational mechanisms, though with a broader range of potential queue jumpers. Thus, for example, access to supranational mechanisms allows groups that may never gain effective access to domestic litigation to place issues on the national stage. These groups may be the usual insiders, but they may also be groups excluded by virtue of their remote location, the grassroots nature of their work, or other factors.

69. Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 123 (2001).

70. While Cassel does not argue that his analysis is inapplicable to economic, social, and cultural rights, he expressly excludes from the scope of his article an analysis of how international human rights law can shape the promotion of these rights. *See id.* at 124.

> domestic dialogues. While reliable quantitative measurement is probably impossible, by strengthening domestic rights institutions, international human rights law has brought incalculable, indirect benefits for rights protection.[71]

A. BRAZIL

In Brazil, the degree to which Inter-American decisions have achieved real-world impact has not varied in relation to the importance of the Commission or the Court's action in a particular case, but instead has been a function of media and public interest in the matter, and the extent to which the government has been pressured to respond.[72] In many instances, the media have not reacted to the actions of the Commission at the key moments in the litigation, but rather have responded in accordance with a different agenda established within Brazil:

> Thus, for example, when the Commission issued its final report [in April 2000], holding the Brazilian State responsible for the October 1992 massacre of 111 prisoners in the Carandiru prison complex,[73] the most serious single human rights violation in recent Brazilian history, the matter hardly registered in the media. Yet in the days immediately preceding [scheduled] trial dates of the commander of the Carandiru massacre, Col. Ubiratan Guimarães, [and during subsequent coverage of civil suits seeking indemnification,] the media provided ample coverage of the Commission's report.[74]

A similar result followed in the case of a series of homicides of young boys in the state of Maranhão that were denounced to the Commission in July 2001.[75] While the Commission's decision to open the first of two cases provoked a moderate initial media response, the October 2001 murder of two more boys in similar circumstances led the domestic and international press to provide extensive coverage of the Inter-American system's involvement in the matter.[76] This pressure, in

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71. *Id.* at 123.

72. *See generally* James L. Cavallaro, *Toward Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil*, 3 CHI. J. INT'L L. 481 (2002).

73. Carandiru, Case 11.291, Inter-Am. C.H.R, Report No. 34/00, OEA/Ser.L/V/II.106, doc. 6 rev. (2000).

74. Cavallaro, *supra* note 72, at 488. *See, e.g.*, Flávia de Leon, *Lider de ação no Carandiru sera julgado em 18 de julho*, FOLHA DE S. PAULO, May 23, 2000 (focusing on the upcoming trial of the police officer responsible for overseeing the massacre and citing, in the course of the article, the proceedings before the Commission); Flávia de Leon, *Começa hoje julgamento de coronel acusado de comandar massacre*, FOLHA DE S. PAULO, Nov. 29, 2000 (focusing on impending trial of commander of the Canrandiru massacre and citing the Commission's determinations in the matter); *Parentes de mortos no Massacre do Carandiru aguardam indenização*, FOLHA DE S. PAULO, Sept. 29, 2002 (focusing on the delays in payment of indemnifications to family members of those killed in the massacre and citing the proceedings in the Inter-American Commission.).

75. *See* Petition on behalf of Raniê Silva Cruz, filed on July 26, 2001, *available at* http://www.global.org.br.

76. Xico Sa, *Castração de garotos assombra o Maranhão*, FOLHA DE S. PAULO, Oct. 28, 2001 (focusing on the most recent homicide and providing extensive information on the petition filed

turn, led the Ministry of Justice to place the Federal Police at the disposition of state authorities to assist in the investigation. The pressure, which stemmed in large part from the Commission's involvement in, and the media coverage of the case, eventually forced Maranhão's governor and then-leading presidential candidate, Roseana Sarney, to allow federal, rather than state, investigation of the killings.

It is apparent that the impact of the Commission's decisions depends largely on a series of extra-legal factors. Primary among these is the role of the media, and its power to affect policy should not be underestimated. A significant part of human rights activism in Brazil, including international rights litigation, involves use of the press to put pressure on the government in individual cases and on policy issues.

1. *The Urso Branco Case*[77]

In June of 2004, hearings were held in the first case against Brazil to be heard by the Inter-American Court. The case involved the Urso Branco penitentiary in the remote state of Rondônia, in which both official brutality and prisoner-on-prisoner violence have claimed the lives of a shockingly high number of prisoners. The most violent clash prior to the beginning of the Inter-American system's involvement—a two-day riot in which authorities deliberately placed prisoners from rival groups together, under circumstances in which it was clear that a violent clash would result, then failed to take measures to stop the twenty-hour killing spree that ensued—left twenty-seven detainees dead in January 2002. Given the repeated acts of violence after this massacre, several of which resulted in additional fatalities, advocates sought precautionary measures from the Commission. Even after these were granted, five detainees were killed over a period of two months. Based on these killings, incidents of beatings and torture, and constant threats made by guards and police against detainees, the petitioners in the case requested that the Commission seek provisional measures from the Inter-American Court. For the first time in a matter involving Brazil, the Commission solicited these measures from the Court, which, in an unprecedented and

several weeks earlier); *see also* Agência Estado, *OEA abre inquérito sobre meninos emasculados no Maranhão*, FOLHA DE S. PAULO, Nov. 29, 2001 (focusing on the second petition to the Inter-American Commission, filed after the October killings), *available at* http://www.estado.com.br/agestado/noticias/2001/nov/29/270.htm. The extensive coverage provided to the matter in the Brazilian media led foreign journalists to address the ritualistic killings as well. *See, e.g.*, Anthony Faiola, *Witchcraft Murders Cast a Grusome Spell*, WASH. POST, Nov. 28, 2001, at C1.

77. On June 6, 2002, the Inter-American Commission submitted to the Inter-American Court a petition requesting that it order the State of Brazil to take urgent measures to protect the lives and physical integrity of inmates at the Jose Mario Alyes Detention Center—known as "Urso Branco." The facts summarized in this section are recited in the Court's Order. *See* Order, Case of Urso Branco Prison, Inter-Am. Ct. H.R. (June 18, 2002), *available at* http://www.corteidh.or.cr/index_ing.html (last viewed Nov. 28, 2004).

sweeping decision, granted the request in June 2002.[78]

Nevertheless, despite repeated orders by both the Commission[79] and the Court,[80] it has been extremely difficult to force the isolated authorities in Rondônia to cede to international pressure. While federal authorities—far more sensitive now to the international stigma attached to litigation before the Inter-American Court—have demonstrated interest in complying with the system's orders, they have been either unwilling or unable to force local prison administrators, guards, and police to alter their abusive policies. Indeed, a recent violent episode in which at least nine people were killed and over 160 held hostage by rioting prisoners led the Commission to issue a public appeal to the Brazilian government, on April 21, 2004, to take adequate measures to comply with the Court's orders.[81] Unlike determinations made by the Commission and the Court at early stages of the process, the Court's decision to order a hearing in the matter provoked a significant media response. After holding hearings in June 2004, the Court issued a third resolution enjoining Brazil to take specific steps to protect the lives and physical integrity of Urso Branco prisoners.[82] In responding to events in Brazil, the media were able to point to the Court's determination to convey the gravity of the situation and the failure of the government.[83] Yet even this response by the national media and the successive orders of the Inter-American Court have resulted in limited impact in Rondônia,

78. *Id.* at para. 5–6. In this first-ever decision on Brazil, the Court based its order that Brazil provide updated information on the detainees held at the Urso Branco prison on guidelines established in the United Nations Standard Minimum Rules on the Treatment of Prisoners. In so doing, the Court granted binding status to at least some of the provisions in the Standard Minimum Rules, a significant legal advance in the protection of persons in detention in the Americas. *Id.* at para. 7, n.3 (citing United Nations, Office of the High Commissioner for Human Rights. *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and adopted by the Economic and Social Council through resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rule 7(1)).

79. The Commission does not publish the text of its determinations granting precautionary measures, but it does summarize these decisions in its annual reports. *See Precautionary Measures Granted or Extended by the Commission in 2002*, Inter-Am. C.H.R., ch. III(C)(1), para. 14, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002). The full text of the Commission's decision is on file with the authors.

80. Orders, Case of Urso Branco Prison, Inter-Am. Ct. H.R. (June 18, 2002; Aug. 29, 2002; and Apr. 22, 2004), *available at* http://www.corteidh.or.cr/seriee_ing/index.html.

81. Press Release, Inter-American Commission on Human Rights Expresses its Concern Over the Situation in the Urso Branco Prison in Brazil, Inter-Am. C.H.R., No. 13/04 (Mar. 19, 2004), *available at* http://www.cidh_org/comunicados/English/2004/13.04.htm (last visited Oct. 31, 2004).

82. Order, Urso Branco Prison Case, Inter-Am. Ct. H.R., (July 7, 2004), *available at* http://www.corteidh.or.cr/seriee_ing/index.html.

83. *See, e.g.*, Agência Estado, *Crise na prisão, Urso Branco leva o Brasil a se explicar na OEA*, AGÊNCIA ESTADO, May 20, 2004 (focusing on the Court's grave concerns with abuses at the Urso Branco prison, upcoming sessions, and the government's failure to comply with measures ordered previously), *available at* http://www.Estadao.com.br/print/2004/mai/20/176.htm.

due largely to the state's isolation within Brazil and the weak constituency in defense of the rights of prisoners.

2. *42nd Police District Case*[84]

This case, which involved the massacre of eighteen prisoners following an aborted escape attempt in February 1989, illustrates that a final determination on the merits of a particular case may not always be the most effective means of achieving justice, even in the individual case. After eight years of litigation in which the Brazilian State consistently and repeatedly missed deadlines and failed to engage the Inter-American system seriously, the Commission prepared a final report condemning the State of Brazil for violations of both the Convention and the Declaration. Shortly before that report was to be published, the Brazilian government expressed its interest in reaching a friendly solution with the petitioners.

The petitioners were initially loath to agree to a friendly settlement, as it seemed that to do so would merely reward the State for its repeated failures with the opportunity to avoid public condemnation by the Commission in what would have been the first case holding Brazil responsible for human rights violations since the State's 1992 ratification of the American Convention on Human Rights. Ultimately, however, petitioners perceived that the position of the Brazilian State was far from monolithic. While the authorities formally responsible for responding to proceedings in the Inter-American system had demonstrated little concern with the case, the National Human Rights Secretariat—recently created at that time—and the local authorities in São Paulo State showed genuine interest in resolving the matter.

Petitioners agreed to meet with representatives of the Commission and Brazil's Ministry of Foreign Relations. It soon became clear that while the Ministry representatives were prepared to offer very little in terms of a solution, their counterparts in São Paulo, where the violations had occurred, were more willing to make critical concessions. In follow-up negotiations with the authorities in São Paulo, which were attended by high-ranking state officials and the National Human Rights Secretary, petitioners managed to obtain the key points that the victims were seeking in the case: substantial compensation for their families, prosecution of those responsible in the ordinary courts rather than in specialized military tribunals, and public recognition by the government of its responsibility for the killings. The decision to overlook repeated procedural violations, even at the expense of an immediate public condemnation of the State, paid off. The terms that the petitioners were

84. The facts recited in this section are set forth in the Parque São Lucas v. Brazil, Case 10.301, Inter-Am. C.H.R., Report No. 40/03, OEA/Ser./L/V/II.114, doc. 5 rev. 1 (2003), *available at* http://www.cidh.org/annualrep/2003eng/brazil.10301.htm.

able to negotiate through the friendly settlement process exceeded any reasonable expectations of government implementation if these recommendations had been included in a final report at the time.

Ultimately, Brazil failed to comply with the all of the provisions agreed to in the friendly settlement, and the Commission published a report condemning Brazil in October of 2003.[85] The report notes, however, that a number of the agreed provisions had been implemented, including the prosecution and subsequent conviction and incarceration of one of the individuals responsible for the violations; the payment of damages to the next of kin of a number of the victims; and relevant changes in Brazilian legislation. Much like in the *Urso Branco* case, despite elite pressure and the existence of some sympathetic government officials, the absence of a popular constituency or broad social movement in support of the prison victims undermined the effect of the Commission's determination in the matter.

B. PERU

Peru's relationship with the Inter-American system suffered a series of radical transformations resulting from internal political pressures on successive governments. The low point, from the perspective of rights defenders, was the Fujimori administration's 1999 attempt to withdraw the State's recognition of the Court's jurisdiction. Although Peru's attempted withdrawal, which the Court itself flatly rejected,[86] was a direct response to the Court's adverse decision in the *Castillo Petruzzi* case,[87] it also sought to avoid the possibility of further adverse decisions in two important and highly politicized matters.[88] A comparison of two cases, *Loayza Tamayo*[89] and *Castillo Petruzzi*, allows us to examine some of the factors that determine the extent to which Court decisions have achieved real-world impact in Peru.

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85. *See id.*

86. *See* Ivcher Bronstein Case Competence, Inter-Am. Ct. H.R. (ser. C) No. 54 para 56(1) (1999). The Court held "[t]here is no provision in the Convention that expressly permits the States Parties to withdraw their declaration of recognition of the Court's binding jurisdiction. Nor does the instrument in which Peru recognizes the Court's jurisdiction, dated January 21, 1981, allow for that possibility." *Id.* para. 39. The Court further held that it would continue to adjudicate the pending matters against Peru, *id.* para. 55–56, and ultimately declared Peru responsible for violations of the Convention in both cases. Ivcher Bronstein Case, Inter-Am. Ct. H.R. (ser. C) No. 74 para. 191(1)–(5) (2001).

87. Castillo Petruzzi v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 33 (1997). We discuss this case in depth below.

88. The *Ivcher Bronstein* case and the *Constitutional Court* case, both of which were pending before the Court, implicated allies of the President. Some human rights groups claim that Fujimori's response to the *Castillo Petruzzi* decision was at least partly motivated by his desire for the Court not to hear these cases.

89. Loayza Tamayo v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 33 (1997).

1. *Loayza Tamayo*[90]

Peruvian security forces seized Maria Elena Loayza Tamayo, a Peruvian national and university professor, without a warrant, on February 6, 1993 after she was named as a member of the guerrilla group Shining Path. Peruvian security forces held Loayza Tamayo incommunicado for ten days, during which time they tortured her and subjected her to cruel and degrading treatment and unlawful pressure. Then Peruvian authorities accused her of treason and brought her before a special military tribunal. A series of trials in both military and civil jurisdictions led to conviction by a "faceless" special tribunal of the civil courts, which sentenced Loayza Tamayo to twenty years' imprisonment.

The Inter-American Commission determined that Peru had violated Loayza Tamayo's rights to personal liberty, humane treatment, and judicial protection as enshrined in the American Convention and recommended that she be released immediately. Peru rejected the Commission's analysis and failed to implement its recommendations on the ground that domestic remedies had not been exhausted. The Commission forwarded the case to the Court and urged Peru to take precautionary measures on her behalf.

The Court confirmed the Commission's allegations and ordered Loayza Tamayo's release, her reinstatement as a university professor, and a series of compensatory measures.[91] She was released from prison shortly thereafter.

The *Loayza Tamayo* case captured the interest of both the domestic and the international communities. From the time of Loayza Tamayo's arrest in 1993 until her release in 1997, a strong popular movement on her behalf generated substantial media attention. In addition, the facts that came to light tended to inspire sympathy among observers. This factor, among others, contributed to making this a "good" case—one in which a decision by the Inter-American Court would be difficult for the state to ignore.

Loayza Tamayo was a university professor, educated, and articulate. In addition, she had educated and articulate advocates with access to substantial resources and ties to the human rights movement: her sister, Carolina Loayza was a professor of humanitarian law at the University of Lima who was able to enlist the help of CEJIL, an international human rights organization, to bring the case to the Commission. Furthermore, Loayza Tamayo's guilt was far from clear, and her story resonated with the public, as it brought to light abusive state practices from which hundreds of other Peruvians suffered.

90. See *id.*, para. 3, for this factual summary.

91. *Id.*

The Loayza sisters did not merely fight the State in the courts, they also mounted a media campaign to influence public opinion. In 1995, Maria Elena sent a letter from prison to Amnesty International describing in explicit detail how she had been tortured, and specifically how she had been raped repeatedly throughout her ten days of incommunicado detention. Furthermore, she publicly refuted the charges against her, and denounced the activities of the Shining Path.

Carolina, meanwhile, brought local attention to the case. In spite of Fujimori's tight control over the media, a number of journalists reported on Maria Elena's arrest, detention, and abuse. Rights activists in Peru and abroad, including Carolina herself, attribute much of their success to media pressure in the case.[92]

Indeed, while the Inter-American Court's decision in the case was undoubtedly an important factor in the Peruvian government's decision to release Maria Elena Loayza Tamayo, it was only one of a number of factors working in her favor. In fact, other elements of the Court's decision—including its order that Peru ensure payment of the victim's full retirement benefits, and that it modify the internal legislation under which she had been convicted to conform with Inter-American human rights norms—that had not been the object of public attention or concern in the way that her release from prison had, still had not been implemented as of the Court's Resolution on Compliance of November 27, 2003.[93]

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92. After her sister's release and the fall of Fujimori, Carolina wrote a letter to the magazine *Caretas*, in which she publicly thanked a journalist for reporting on her sister's case, which she believed influenced its positive outcome. Carolina Loayza, Letter, Nos Escriben y Contestamos, CARETAS, Oct. 9, 1997, available at http://www.caretas.com.pe/1486/cartas/cartas.htm. The original Spanish text reads:

> Lima, 2 de octubre de 1997.
>
> En nombre de mi hermana María Elena Loayza Tamayo deseo expresarles mi profundo agradecimiento por el apoyo que desde el primer momento tuvieron a bien brindarle, en este caso el de una inocente injustamente condenada. Especial mención quiero hacer al periodista Jimmy Torres por su solidaridad y humanidad. Si bien María Elena aún no obtiene su libertad tal como lo ha ordenado la Corte Interamericana de Derechos Humanos, en un fallo histórico y sin precedentes, considera que éste es el momento de agradecer a quienes creyeron en ella y asumieron su defensa en todo momento.
>
> Carolina Loayza

Id.

93. *See* Loayza Tamayo v. Peru (Compliance with Judgment), Inter-Am. Ct. H.R. (2003). In its merits and reparations judgments, the Court ordered Peru to release Maria Elena from prison; to reinstate her to her public university position; to ensure payment of her retirement benefits; to vacate any adverse domestic sentences against her based on the facts related to the case; to investigate and punish the individuals responsible for her abuse; to pay damages and costs to Maria Elena and her next of kin; and to modify internal legislation to conform to inter-American standards. *Id.* at 1–2. As of November 2003, the State had only fully complied with its obligations to release Maria Elena and to pay damages and costs, and had partially complied with its obligation to reinstate her. *Id.* at 8–10. The Court found that compliance with the remaining provisions of its order was still pending. *Id.*

2. *Castillo Petruzzi*[94]

The *Castillo Petruzzi* case involved four Chilean nationals serving life sentences in Peru after being arrested on terrorism charges and convicted of treason by a "faceless" military tribunal. Upon receiving a petition on behalf of the victims, the Commission issued a report in which it found Peru responsible for a number of Convention violations. The Commission recommended that the State nullify the proceedings against the victims and grant them "a new trial in the regular court system, with full guarantees of due process."[95] Peru rejected the Commission's analysis and declined to implement its recommendations. The Commission then forwarded the case to the Inter-American Court, which upheld the Commission's findings and ordered that the victims be retried. The Court further ordered Peru "to adopt the appropriate measures to amend those laws that this judgment has declared to be in violation of the American Convention on Human Rights."[96]

The State quickly responded to the Court's decision, forwarding an Order of the Plenary Court of the Supreme Council of Military Justice, which held that the Inter-American Court's decision "lack[ed] impartiality and infringe[d] on the Political Constitution of the State, being, therefore, impossible to execute."[97] Fujimori publicly announced that his government had no intention of carrying out the Court's sentence on the purported basis that implementation of the ruling would lead to the release of thousands of convicted terrorists—an argument that, according to Human Rights Watch "had no basis in fact and seriously misled the Peruvian public."[98] Indeed, the argument seemed calculated to appeal to the public's fear of terrorist activity in a time of social upheaval. Shortly thereafter, a Peruvian Council of Ministers proposed a legislative resolution purporting to retract the State's recognition of the Court's jurisdiction, and on July 8, 1999, the Peruvian Congress approved the resolution.[99]

The decision by Congress was taken amid a heated debate in the

94. This factual summary is based on the recitation of the facts in Castillo Petruzzi v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 52 (1999).

95. *Id.*, para. 16.

96. *Id.*, para. 226.

97. Castillo Petruzzi v. Peru (Compliance With Judgment), Inter-Am. Ct. H.R. (1999) (quoting June 11, 1999 Order of the Plenary Court of the Supreme Council of Military Justice).

98. HUMAN RIGHTS WATCH, WORLD REPORT 2000, PERU, HUMAN RIGHTS DEVELOPMENTS, *available at* http://www.hrw.org/wr2k/americas-08.html (last visited Oct. 31, 2004).

99. Legislative Resolution No. 27152, of July 8, 1999. This legislation was repealed by Legislative Resolution No. 27,401, published Jan. 19, 2001 in the official gazette El Peruano. *See* Withdrawal from the jurisdiction of the Court by the Peruvian State, *reprinted in* Annual Report 1998, Inter-Am. Ct. H.R. 351, OEA/Ser.L/V/III.47, doc. 6 (2000), *available at* http://www1.umn.edu/humanrts/iachr/Annuals/app16-99.html; Draft Follow-up Report on Compliance by the Peruvian State with the Recommendations made by the IACHR in the IACHR's Report on the Situation of Human Rights in Peru (2000), Inter-Am. C.H.R., OEA/ser./L/V/II.114, doc. 5 rev. 16 (2002).

media. The government framed the debate in terms of state sovereignty and the appropriate limits on the authority of the Inter-American Court, avoiding the issue of respect for substantive human rights norms. Groups opposing the government's position followed the government's lead and grounded their positions in formalistic arguments about international law.[100] With the debate cast in these terms, issues such as justice with respect to the victims in the particular case were obscured. Furthermore, the victims themselves were less sympathetic than Maria Elena Loayza Tamayo had been. Their innocence was not clear, and their status as outsiders (Chilean nationals being tried for crimes allegedly committed in Peru) was regularly evoked by the Peruvian media. For all of these reasons, the case failed to gain the support of the Peruvian public.

At the end of 2000, the Fujimori government collapsed amid a major political corruption scandal, during which Vladimiro Montesinos—Fujimori's advisor and head of the National Intelligence Service—was filmed accepting bribes, and the Peruvian Congress declared Fujimori himself morally unfit for service.[101] After the regime change, the new government repealed the legislative resolution purporting to withdraw Peru's recognition of the Court's jurisdiction.[102] Both the Court and the Commission continued to monitor Peru's compliance with Inter-American decisions. The Commission issued a report in 2000 in which it reiterated, among other recommendations, the Court's orders in *Castillo Petruzzi*.[103] When the Commission revisited these issues in 2002, it found that some progress had been made toward compliance, particularly in the judicial sphere, but that the legislative changes ordered by the Court and reiterated by the Commission had not been implemented.[104]

Peru's failure to comply fully with the Court's decision in *Castillo Petruzzi*, even after the fall of Fujimori and the State's renewed recognition of the Court's jurisdiction, is attributable, in part, to the public's inability or unwillingness to exert pressure on the State to comply with the decision. That is, in the absence of a robust, popular movement to demand respect for the rights embodied in Court decisions

100. *See, e.g.*, Francisco Soberón Garrido, *Las falacias del gobierno peruano*, in Agencia Latinoamericana de Información, America Latina en Movimiento (July 28, 1999), *available at* http://alainet.org/docs/476.html (last visited Oct. 31, 2004).

101. *See, e.g.*, *The Charges Against Montesinos*, BBC News, June 25, 2001, *available at* http://news.bbc.co.uk/1/hi/world/americas/1407621.stm (last visited Oct. 31, 2004); HUMAN RIGHTS WATCH, WORLD REPORT 2002, PERU, HUMAN RIGHTS DEVELOPMENTS, *available at* http://hrw.org/wr2k2/americas9.html.

102. *See* Draft Follow-up Report on Compliance by the Peruvian State with the Recommendations made by the IACHR in the IACHR's Report on the Situation of Human Rights in Peru (2000), Inter-Am. C.H.R.,OEA/ser./L/V/II.114, doc. 5 rev. (2002).

103. Second Report on Human Rights in Peru (2000), Inter-Am. C.H.R., ch. V, OEA/ser.L/V/II.106, doc. 59 rev. (2000), *available at* http://www.cidh.org/countryrep/Peru2000en/TOC.htm.

104. *Id.* ch. III(B)(1)(c).

(absent either because repressive measures have stifled any such movement, or because of public support for stringent security measures in the context of social unrest, even at the expense of respect for human rights), such decisions have provoked little real-world impact, as in the *Castillo Petruzzi* case.

C. Trinidad and Tobago: Denunciation of the American Convention

Another striking example in which adverse rulings gave rise to an extreme reaction by the state was Trinidad and Tobago's denunciation of the Convention in May of 1998. The move came as a response to the Commission's ongoing investigation of the State's application of the death penalty[105] and after the Court ordered the State to suspend a number of scheduled executions while it examined the practice in several cases pending before it.[106] In blatant violation of the Court's order, Trinidad and Tobago proceeded with the execution of six individuals convicted in a domestically significant case.

The State alleged that the Court lacked jurisdiction in the pending cases. Rejecting the State's argument, the Court found that Trinidad and Tobago's application of the death penalty violated the Convention and ordered that the State "abstain from applying the Offences Against the Person Act of 1925 and within a reasonable period of time [to] modify said Act to comply with international norms of human rights protection."[107] The Court also ordered the State to take measures to compensate the family members of the victims, and to review and retry specific cases in which the death penalty had been applied.[108] Although the Court directed the State to report periodically on its compliance with the Court's orders, the Court issued an opinion regarding compliance on November 27, 2003, in which it observed that the State had not made any such reports.[109]

The social climate in which the State defied the Court's orders was characterized by deep-seated tensions between the local population's overwhelming support for capital punishment and the international community's sustained pressure on Trinidad and Tobago and other Caribbean nations to modify their current practice.[110] One salient feature

105. *See e.g.*, Anthony Briggs, Case 11.815, Inter-Am. C.H.R., Report No. 44/99, OEA/ser.L/V./II.102, doc. 6 rev. (1999). In the course of the Commission's investigation of this case, the Attorney General of Trinidad and Tobago stated that the "Commission has no power to challenge the implementation of a sentence of death imposed by a court of competent jurisdiction in Trinidad and Tobago." *Id.* para. 4.

106. Hilaire v. Trinidad and Tobago, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002).

107. *Id.* para. 223(8).

108. *Id.* para. 223(10)–(13).

109. Hilaire v. Trinidad and Tobago (Compliance with Judgment), Inter-Am. Ct. H.R. (Nov. 27, 2003), *available at* http://www.corteidh.or.cr/index_ing.html.

110. *See Privy Council Blocks Executions*, BBC News, May 18, 1999, *available at*

of this tension is the fact that although Trinidad and Tobago has been an independent nation since 1976, the judicial instance of last resort in the country is the British Privy Council, which has the authority to stay the executions of individuals sentenced to death under local law. In fact, the Privy Council has stayed several executions in Trinidad and Tobago, including several cases giving rise to petitions in the Inter-American system.[111] While the United Kingdom has tried to persuade its former colonies to abolish the death penalty for years, local support for capital punishment has neutralized international pressure.

In this context, the State's repudiation of the authority of the Inter-American system may be seen not only as an expression of state sovereignty, but also as a vindication of popular sentiment and rejection of a system imposed by colonial rule. Trinidad and Tobago's response to the Court's orders underscores the limits of what Inter-American decisions can achieve when they run counter not only to state interest (as is often the case) but also to popular sentiment. In this regard, one is reminded of the limited impact of the Urso Branco resolutions in Brazil, largely due to the absence of popular support for the underlying cause—respect for the rights of prisoners.

D. Case Studies—Conclusions

Experience counsels that governments accept the sentences of the Court when a series of conditions are met. The first concerns the legitimacy of the Court and of the Inter-American system itself. A state will accept and implement decisions of the Court to the extent that within its internal political system, the Inter-American system, and the Court in particular, are recognized as legitimate. As a legal matter, this recognition may be codified in law.[112] But the legitimacy inquiry should not be limited to legislation. In order for states to recognize and implement decisions—particularly ones that are not favorable politically—the legitimacy of the Court must be accepted by political forces, civil society, and the media.

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http://news.bbc.co.uk/1/hi/world/americas/346513.stm.

111. *See, e.g.*, Hilaire v. Trinidad and Tobago, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002) (consolidating a number of cases involving the death penalty in Trinidad and Tobago); *see also* Haniff Hilaire v. Trinidad and Tobago, Case 11.816, Inter-Am. C.H.R., Report No. 43/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1999); Mohammed v. Trinidad and Tobago, Petition 12.401, Inter-Am. C.H.R., Report No. 50/02, OEA/ser. L./V./II.117, doc. 1 rev. 1 (2003); Ramlogan v. Trinidad and Tobago, Petition 12.355, Inter-Am. C.H.R., Report No. 48/02, OEA/ser. L/V./II.117, doc. 1 rev. 1 (2003). It is worth noting that in the vast majority of these cases, victims were represented in the inter-American system by London-based solicitors.

112. *See, e.g.*, Victor Manuel Rodríguez Rescia, La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos (Dr. Hugo Alfonso Muñoz Quesada et al. eds. 1997) (surveying the constitutional and sub-constitutional norms giving legal force to determinations of the Inter-American Court of Human Rights in Latin American nations, in particular, Colombia, Peru, Costa Rica, Venezuela, and Nicaragua).

Even when a state accepts the legitimacy of the Inter-American system in principle, it may fail or refuse to implement particular decisions, as the examples of Peru and Trinidad and Tobago illustrate. Thus, we posit that in order for states to implement decisions of the Commission or Court, at a minimum, they must be convinced of their legitimacy as a matter of law. In this regard, to the extent these bodies seek to extend legal protections to economic, social, and cultural rights, they should seek firm ground on which to anchor their decisions.

The case studies also demonstrate several important principles that enable us to understand when cases are likely to have an impact domestically. First, it appears vital, if not indispensable, that international litigation be one element of a broader strategy to mobilize for change. Other elements in this strategy include work with supportive journalists, as in *Loayza Tamayo* and several of the Brazilian cases cited, and with grassroots and international movements. Litigation strategies not linked in this way, as has been the case with the death penalty challenges in Trinidad and Tobago, are almost certainly destined to fail, regardless of the outcome achieved in Court.

Second, advocates must bear in mind that a final determination on the merits of a case by the Commission or the Court may not be the most effective tool for achieving justice, even in the individual case, as states may be more likely in some cases to enforce negotiated settlements than Commission or Court orders. Again, this point serves as a lesson to lawyers that they must be mindful of their role in the larger movement, and should not remain obstinately focused on achieving legal judgments that may have little effect.

Finally, a few important lessons may be drawn with regard to timing. First, advocates must accept a great deal of unpredictability. Regime change and national political agendas are forces that are difficult to foresee with any degree of certainty. Litigants must recognize this and be ready and able to advocate for their case or issue when the political moment in the country so permits. They must also recognize that the impact of cases will rarely be established by the timetable of litigation. Rather, as the case studies above have demonstrated, points in which pressure will be effective are primarily set by domestic political agendas, social movements, and other non-legal forces. To be effective, international litigants must accept their often secondary or supporting roles and be prepared to advocate domestically when advantageous.

III. Advancing Economic, Social, and Cultural Rights Through Civil and Political Rights: Theory and Practice

While most of the American States have formally accepted the theoretical basis for recognizing economic, social, and cultural rights, practice tends to reflect the traditional, generational approach to human

rights. This approach makes a distinction between civil and political rights on the one hand (which are understood to impose specific, justiciable obligations on states, and which are regularly enforced by mechanisms for human rights protection) and economic, social, and cultural rights on the other (whose concomitant obligations are less clear, and whose enforcement has been more complicated).

The traditional classification framework posits that civil and political rights are fundamentally different in nature from economic, social, and cultural rights in that the former are rights of "negative liberty," requiring only that the state abstain from particular acts that would violate individual freedoms, while the latter require action on the part of the state to assure their implementation. Thus, for example, on this view, to guarantee civil and political rights, such as the right to life or the right to freedom of speech, the state need only not kill, in the first case, and not limit free speech, in the second. By contrast, to ensure the enjoyment of economic, social, and cultural rights, such as the right to education or the right to health, the state must engage in positive action: construction of schools, hiring of professors, etc., to ensure educational rights; training of medical staff, construction of hospitals, provision of medicine, etc., to guarantee the right to health.

More recent analyses of the traditional distinction between civil and political rights and economic, social, and cultural rights have demonstrated the many flaws in the rationale ordinarily employed to justify a differential treatment for these different classes of rights.[113] The most convincing critique of the generational distinction focuses on the elements of negative liberty and positive action inherent in rights from both generations. According to numerous scholarly views synthesized by Victor Abramovich and Christian Courtis, the distinction is untenable when subjected to closer examination, given that civil and political rights contain elements that require positive action by the state, while economic, social, and cultural rights contain elements that require the state to abstain from actions that violates these rights.[114] As they write,

> Even those rights that appear to entail what may be characterized as a "negative obligation," that is, those that entail restrictions on the State's activities in order not to interfere with individual liberties—for

113. *See e.g.*, THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Fons Coomans & Fried van Hoof, eds. 1995) (series of essays in defense of the justiciability of the rights to education, housing, health and food); INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS, LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES: UN DESAFÍO IMPOSTERGABLE (San Jose, Costa Rica 1999) (collection of articles on the advance of economic, social, and cultural rights in Argentina, the Dominican Republic, Venezuela and Nicaragua).

114. Victor Abramovich & Christian Courtis, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales*, *in* LA APLICACIÓN DE LOS TRATADOS INTENACIONALES SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES 283–350 (Martín Abregú & Christian Courtis eds. 1997).

> example, prohibitions against arbitrary detention, censorship of the press through prior restraint, or the violation of correspondence and private documents—also entail substantial activity on the part of the State. The State must guarantee that non-State actors do not interfere with individual freedoms, the exercise of which necessitates activity by police, public security and defense forces, and the judiciary. Obviously, carrying out these functions entails positive obligations.[115]

At the same time, at the other extreme, one finds that inherent in economic, social, and cultural rights, is:

> [t]he concomitant existence of obligations to refrain from action: the right to health entails the State's obligation not to harm an individual's health; the right to education presumes the obligation not to worsen education; the right to cultural preservation implies the obligation not to destroy cultural patrimony . . . many of the legal actions giving rise to judicial enforcement of economic, social and cultural rights are directed at correcting activities by the State that violate its obligation not to act.[116]

Beginning with this realization, Abramovich and Courtis set out the basic components of rights, ranging from negative liberty, at one extreme, to provision of goods and services directly by the state at the other. In this scheme, rights—both civil and political and economic, social, and cultural—include, in differing degrees, these varying elements.

Abramovich and Courtis demonstrate that economic, social, and cultural rights demand not only affirmative actions to guarantee and promote, but also require that the state respect and protect.[117] Citing the example of the right to food, the authors argue that states must not:

> expropriate lands from a community whose sustenance depends principally or entirely upon access to that resource, without taking appropriate alternative measures. The State's obligation to protect rights includes the obligation to ensure that individuals are not deprived—for example, by the actions of third parties, such as

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115. *Id.* at 286 (authors' translation). The original Spanish text reads:

> Aun aquellos derechos que parecen ajustarse más fácilmente a la caracterización de 'obligación negativa', es decir, los que requieren una limitación en la actividad del Estado a fin de no interferir la libertad de los particulares—por ejemplo, la prohibición de detención arbitraria, la prohibición del establecimiento de censura previa a la prensa, o bien la prohibición de violar la correspondencia y los papeles privados—, conllevan una intensa actividad estatal destinada a que otros particulares no interfieran esa libertad, de modo tal que la contracara del ejercicio de estos derechos está dada por el cumplimiento de funciones de policía, seguridad, defensa y justicia por parte del Estado. Evidentemente, el cumplimeiento de estas funciones reclama obligaciones positivas.

116. *Id.* at 287 (authors' translation). The original Spanish text reads:

> [l]a existencia concomitante de obligaciones de no hacer: el derecho a la salud conlleva la obligación estatal de no dañar la salud; el derecho a la educación supone la obligación de no empeorar la educación; el derecho a la preservación del patrimonio cultural implica la obligación de no destruir el patrimonio cultural.... muchas de las acciones legales tendentes a la aplicación judicial de los derechos económicos, sociales y culturales se dirigen a corregir la actividad estatal cuando ésta incumple con obligaciones de no hacer.

117. *Id.*

> dominant economic groups—of the basic resources such as access to land, water, or the labor market, which are necessary to satisfy their need for food.[118]

In light of the above, it is clear that a new analytical framework is required to ensure the protection of economic, social, and cultural rights. Indeed, a study of cases from the European and universal (i.e., United Nations) human rights systems, as well as recent decisions issued by the Inter-American Commission and Court, suggests several approaches for expanding the protection afforded to economic, social, and cultural rights.

Two approaches that have emerged in the European, universal, and, increasingly, Inter-American contexts—and which we believe are the most promising in terms of achieving real-world results—are based on expansive interpretations of well-established rights. As we discuss below, the first approach entails an analysis of economic, social, and cultural rights in the context of a general principle of non-discrimination. In the second approach, economic, social, and cultural "elements" of rights traditionally understood as civil and political are considered integral components of these rights, such that the state's failure to respect them may result in violations of applicable human rights instruments.

A. The Non-Discrimination Principle

Article 1 of the American Convention, which sets forth states' general obligations establishes that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, *without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*[119]

Neither the Commission nor the Court has referred explicitly to the non-discrimination element of Article 1 in finding a violation of economic, social, or cultural rights. Yet the Court recently held, in Advisory Opinion OC-18,[120] relating to the rights of migrant workers in the Americas, that the principles of non-discrimination precluded states from denying workers fundamental rights on the basis of their migratory

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118. *Id.* (authors' translation). The original Spanish text reads:

> expropiar tierras a una población para la cual el acceso a ese recurso constituye la única o principal forma de asegurar su alimentación, salvo que se adopten medidas alternativas apropiadas.
>
> La obligación estatal de proteger el derecho incluye el deber de prevenir que las personas resulten de una u otra manera privadas de sus recursos básicos para satisfacer sus necesidades de alimentación, por otras personas, por ejemplo grupos económicos dominantes, en aspectos diversos como acceso a la tierra, al agua, al mercado, al trabajo.

119. Am. Conv. H.R., *supra* note 12, art. 1(1) (emphasis added).

120. OC-18 Ad. Op., Inter-Am. Ct. H.R. (ser. A) (2003).

status.[121] The Court held that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature."[122] The Court went so far as to hold that non-discrimination and equal protection principles have attained the status of *jus cogens* norms (i.e., peremptory norms of international law based on universal consensus regarding certain elemental values that states cannot legitimately oppose through domestic legislation).

The Court's reasoning in OC-18 reflects two separate theoretical bases for its expansion of economic, social, and cultural rights. The first involves increased protection for certain labor rights directly by recognizing their fundamental and inalienable nature, and which thus entails stricter duties on the part of states.[123] The second basis for expanding these rights is indirect. This basis works through application of the non-discrimination principle to ensure that these rights are guaranteed with respect to all classes of workers, including undocumented migrants. While the Court's holding in OC-18—as in all advisory opinions—is intended to resolve abstract questions of law and does not determine any concrete violations, it suggests that given the right factual circumstances, the Court may be disposed to expand protection of economic, social, and cultural rights in both of these ways.[124]

Prior to its decision in OC-18, the Court had applied the non-discrimination principle in a less explicit fashion in promoting certain economic, social, and cultural rights. In OC-11, the Court considered whether the indigence of a petitioner could constitute legitimate grounds for an exception to the rule that domestic remedies must be exhausted before seeking recourse to the Commission and concluded that:

> If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status

121. *Id.*

122. *Id.* para. 173(8).

123. Support for the direct justiciability of labor rights can be found in Article 8(a) of the San Salvador Protocol, which specifically provides for the litigation of labor-related claims. *See supra* note 7.

124. The Court's extension of the principle of *jus cogens* to protect the labor rights of migrant workers raises some concerns. In particular, the Court's willingness to apply broadly a previously limited doctrine of international law may suggest that the Court is more interested in establishing novel and forward-looking precedent than in adjudicating cases in a way likely to effectuate real-world change. Because OC-18 involved the request for an advisory opinion rather than a contentious matter, no particular state is obligated to implement its terms in the short run. This fact renders assessment of its effectiveness more difficult. Yet, given its sweeping determinations, and the prevalence of state abuse of migrant labor rights in the Americas (*See* Brief Amici Curiae of the Harvard Immigration and Refugee Clinic, Student Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, & Global Justice Center, Jan. 11, 2003, *available at http://www.global.org.br*), there is every reason to suspect that OAS member states will fail to comply with the opinion expressed in OC-18.

> (in this case, his indigency), prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.
>
> [P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention.[125]

While the Court stopped short of declaring that states have an affirmative duty to provide free legal services to indigent individuals, it found that the non-provision of such services could give rise to a violation of the Convention's fair trial guarantees. In this way, the Court used a non-discrimination rationale to expand state responsibility beyond the traditional realm of upholding "negative liberties."

For its part, the Inter-American Commission effectively advanced the economic, social, and cultural rights of women by application of the anti-discrimination principles in *Maria Eugenia Morales de Sierra v. Guatemala.*[126] In that case, the Commission considered provisions of the Guatemalan Civil Code that relate to the roles of men and women within the family. The Commission found that provisions that limited the rights of married women by according their husbands the right to determine whether or not their spouses could work outside the home violated article 17(4) of the Convention (rights of the family), in conjunction with article 16(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).[127]

Precedent for the Inter-American Court's use of the non-discrimination principle can be found in both the European and universal human rights contexts. In fact, for two decades the European Court of Human Rights ("ECHR" or the "European Court") has consistently and explicitly referred to the European Convention's non-discrimination provisions in decisions that have expanded protection for economic, social, and cultural rights. Article 14 of the European Convention reads:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or

125. Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), OC-11 Ad. Op., Inter-Am. Ct. H.R. (ser. A) paras. 22–23 (1990).

126. María Eugenia Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/ser. L./V./II.111, doc. 20 rev. (2001).

127. This case illustrates the tendency of the Commission to apply norms established in universal treaties. A detailed examination of the ways in which these norms may be used to advance respect for human rights in general terms is beyond the scope of this article. We do, however, cite a few of the most important precedents for the promotion of economic, social, and cultural rights.

other status.[128]

The European Court has found violations of this Article in several cases with important economic, social, and cultural elements. For example, in *Abdulaziz, Cabales, and Balkandali v. The United Kingdom*,[129] petitioners (non-native, permanent residents of the United Kingdom) questioned distinctions in British immigration law that effectively denied the right of entry to their male spouses in circumstances in which female spouses would have been granted residence. Each of the petitioners lawfully resided in the United Kingdom and had sought permission for her husband to join her in residence. In each case, such permission was denied by immigration authorities. The petitioners argued that the refusal to grant residence to their male spouses in circumstances in which females spouses of male applicants would have been granted violated, *inter alia,* Article 14 of the Convention. The Court upheld their claim.

Critical to the Court's analysis was the evaluation of economic rights. The United Kingdom argued that it could rationally and legitimately distinguish between female and male spouses because the latter were far more likely to seek employment than female spouses. The government presented evidence concerning the then-current economic crisis and level of unemployment in the United Kingdom, as well as support for the position that male immigrants were more likely to seek work than female immigrants. While the *Abdulaziz* Court analyzed the issues before it in the context of family rights (Article 8) and the prohibition of discrimination (Article 14), it is clear that the decision has implications for fundamental economic rights, such as the right to seek employment.

In *Schuler-Zgraggen v. Switzerland*,[130] the European Court went further in establishing the application of the principle of non-discrimination to economic, social, and cultural rights. In that case, the Court reviewed a Swiss court's denial of unemployment benefits to a married woman with a two-year old child on the theory that she was unlikely to seek work outside her home. Had she been a childless man, the Swiss court would presumably have recognized the right to unemployment benefits. The European Court held that the decision violated the non-discrimination clause of Article 14 of the European Convention. As in *Abdulaziz*, the Court explicitly held that economic rights that would not otherwise be protected by the Convention would be guaranteed against discriminatory application.

Several decisions of the United Nations Human Rights Committee,

128. Eur. Conv. on H.R., art. 14.

129. Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) (1985).

130. Schuler-Zgraggen v. Switzerland, 263 Eur. Ct. H.R. (ser. A) (1993).

the body charged with interpreting and applying the International Covenant on Civil and Political Rights, support the doctrine of the European Court of Human Rights in applying the principle of non-discrimination to economic, social, and cultural rights even when these are not the subject of protection on their own. In *Zwaan de Vries v. The Netherlands*, the Committee issued a ruling extending the right to non-discrimination to economic rights otherwise clearly beyond the scope of the Civil and Political Rights Covenant.[131] In *Zwaan de Vries*, the Committee considered legislation that required married women seeking unemployment compensation to show that their income had been the primary source of income for their families. Neither married men, nor single men or women were required to make such a showing. In rejecting the undue burden on married women, the Human Rights Committee wrote:

> Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.[132]

The *Zwaan de Vries* holding allowed the Human Rights Committee to establish with crystal clarity the expansive nature of the principle of non-discrimination. Whatever the economic, social, or cultural right—social security, in these cases, or any other benefit or program that a state may provide—it may never be provided in a discriminatory fashion under the principles of international human rights law. As we consider below, petitioners may achieve significant results by defining discrimination expansively, as well as by finding applications of this principle to an increasing range of state activity.

B. THE "ELEMENTS" APPROACH

In a number of recent decisions, the Inter-American Court and Commission—as well as individual judges in separate opinions—have construed classic civil and political rights expansively so as to include economic, social or cultural elements. The first example of this approach by the Court was in the *Baena Ricardo* case, in which the Panamanian government summarily dismissed 270 employees in retaliation for their participation in a demonstration.[133] While the Court considered violations of Convention articles traditionally associated with civil and political

131. Zwaan-de Vries v. The Netherlands, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. Supp. No. 40 (A/42/40), at 160 (1987).

132. *Id.* para. 12.4.

133. Baena Ricardo et al. v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 72 (2001).

rights,[134] its discussion of the right to due process included an acknowledgment of the way in which violations of this right may have serious economic, social, and cultural implications.

In support of its holding in favor of the dismissed workers, the Court made specific reference to the severe social and economic consequences of the State's violation of due process:

> The Court is not oblivious to the fact that the dismissals, made without the guarantees of Article 8 of the Convention, had serious social and economic consequences for the persons dismissed and their relatives and dependants, such as the loss of income and a reduction of the living pattern. There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the worker a due process with the guarantees provided for in the American Convention.[135]

The Court's holding in *Baena Ricardo* indicates its willingness to consider the economic and social consequences of violations of civil and political rights. Though the Court did not explicitly construe these consequences as "elements" of rights established in the Convention—though it would do that in later cases, as we shall see—the mere recognition that such consequences were relevant to the Court's holding was an important first step to expanding protection of economic, social, and cultural rights.[136]

In *Five Pensioners v. Peru*[137] the Court took a step further in examining economic, social, and cultural rights in the context of a petition alleging the violation of civil and political rights. In *Five Pensioners*, a group of retirees alleged that Peru had arbitrarily and drastically reduced pension payments to which they were entitled. Petitioners argued their case on two separate grounds: first, that the State's action constituted a violation of Article 21 of the Convention (right to private property—a classic civil and political right), and, second, that it constituted a violation of Article 26 of the Convention (relating to state obligations to advance economic, social, and cultural rights).

In a significant and revealing decision, the Court upheld the Commission's claims based on Article 21 but refused to adjudicate its claims based on Article 26. The Court held the right to social security

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134. *Id.* para. 1.

> The Commission submitted the case in order for the Court to decide whether or not Panama had violated Articles 1(1) (Obligation to Respect Rights); 2 (Domestic Legal Effects); 8 (Right to a Fair Trial); 9 (Freedom from Ex Post Facto Laws); 10 (Right to Compensation); 15 (Right of Assembly); 16 (Freedom of Association); [and] 25 (Right to Judicial Protection) . . . of the Convention.

135. *Id.* para. 134.

136. It is worth noting that Panama has failed to comply fully with the Court's orders and has recently challenged the Court's jurisdiction to monitor compliance with the judgment. *See id.*

137. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

payments to be a property right, and therefore fully protected by the guarantees of Article 21. It based this holding on "a progressively developing interpretation of international instruments that protect human rights."[138] The Court's broad construction of property rights is an example of how it may incrementally expand economic, social, and cultural rights through an expansive interpretation of substantive rights traditionally understood as civil and political.

We will discuss the Court's terse holding with respect to the Commission's Article 26 claim in a later section, but note here our view that the Court's refusal to adjudicate the claim is evidence that Article 26 is generally a weak tool for enforcing economic, social, and cultural rights.

The *Five Pensioners* case was not the first time the Court had addressed economic, social, and cultural imperatives through an expansive view of property rights. In August of 2001, the Court issued a landmark decision in the matter of *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. The Republic of Nicaragua.*[139] In that case, the Court addressed the scope of property rights under Article 21 in the context of a claim by an indigenous community seeking to assert collective property rights against the Nicaraguan government.

Noting that human rights treaties are living instruments subject to change over time, the Court concluded that:

> Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention—which precludes a restrictive interpretation of rights—, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.[140]

The Court is currently considering a second case involving indigenous rights, *Yakye Axa v. Paraguay.*[141] Petitioners in that case allege, among other claims, that the State failed to provide the community with adequate assistance during the processing of their territorial claims. This failure, they argue, rendered the community's situation with respect to food security, medical care, and sanitation extremely precarious, and thus constituted a violation of Article 27 of the International Covenant on Civil and Political Rights (rights of

138. *Id.*

139. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001).

140. *Id.* para. 148.

141. Yakye Axa Indigenous Community of the Enxet-Lengua People, Paraguay, Case No. 12.313, Inter-Am. C.H.R., Report No. 2/02, OEA/ser. L/V./II.117, doc. 1 rev. 1 (2002).

minorities) as well as of several articles of the International Labor Organization Convention 169 concerning tribal and indigenous peoples. While the Court's analysis of this claim remains to be seen, the case presents an opportunity for it to determine whether the State has an affirmative obligation to provide economic assistance to the community pending procedures to formalize its territorial claim.

The Court's holdings in *Baena Ricardo*, *Five Pensioners*, and *Awas Tingni* resonate with a quarter century of jurisprudence of the European Court. In 1979 the Court issued its judgment in *Airey v. Ireland*,[142] a case involving an Irish woman, Johanna Airey, who had unsuccessfully sought to conclude a separation agreement from her husband. Under Irish law, while divorce was not available at the time of the case, the High Court could issue a decree relieving spouses from the duty to cohabitate. The legal costs involved in obtaining such a decree varied from 500–700 pounds when not contested, and 800–1200 pounds when contested. The Court found that Ms. Airey lacked the means to pay these fees. Ireland did not provide free legal aid to persons like Ms. Airey seeking such judicial decrees. The petitioner alleged a series of violations of the European Convention on Human Rights, in particular, the right to legal assistance (Article 6), the right to family life (Article 8), the right to an effective remedy (Article 13), and the right to be free from discrimination (Article 14 in conjunction with Article 6 on right to legal assistance). While the Court did not reach the question of non-discrimination (as the Inter-American Court would later do with respect to similar issues in OC-11), it responded to Ireland's claim that it had no duty under the European Convention to provide legal aid (an economic right), with the following observations:

> The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention . . . is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. . . . Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[143]

Thus, despite the Court's recognition that the Convention protected "essentially civil and political rights," it imposed duties of an economic nature on the Irish government and recognized what, in practice, was an economic demand of Ms. Airey.

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142. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979).

143. *Id.* para. 26.

The Human Rights Committee of the United Nations, in its sixth official comment, supported the "elements" approach in the context of the right to life.[144] In that comment, the Committee defended this interpretation of the right to life:

> [T]he Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[145]

This expansive view of the right to life was first expressed in the Inter-American context by Judges Cançado Trindade and Abreu Morelli in their concurring opinion in the *Villagrán Morales*[146] case. In that case, the two judges found that "the arbitrary deprivation of life is not limited . . . to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity,"[147] As Judge Cançado Trindade wrote, "[t]his outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social, and cultural rights, thus illustrating the interrelation and indivisibility of all human rights."[148]

The Court as a whole echoed this analysis in Advisory Opinion OC-17,[149] when it construed the Convention's right to life provision expansively as applied to children:

> Regarding conditions for care of children, the right to life that is enshrined in Article 4 of the American Convention does not only involve the prohibitions set forth in that provision, but also the obligation to provide the measures required for life to develop under decent conditions.[150]

On the basis of this reasoning, the Court concluded that

> respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in Article 4 of the American Convention on Human Rights, but also the obligation to adopt the measures required for children's existence

144. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., 16th Sess., Gen. cmt. 6, art. 6, para. 6, U.N. doc. HRI/GEN/1/Rev.1 (1994).

145. *Id.* para. 5.

146. Villagrán-Morales v. Guatemala ("Street Children" Case), Inter-Am. Ct. H.R. (ser. C) No. 63 (1999).

147. *Id.* para. 4 (Cançado Trindade, J. & Abreu-Burelli, J., concurring).

148. *Id.* (Cançado Trindade, J. & Abreu-Burelli, J., concurring).

149. OC-17 Ad. Op., Inter-Am. Ct. H.R. (ser. A) (2002).

150. *Id.* para. 80 (citing Villagrán-Morales v. Guatemala ("Street Children" Case), Inter-Am. Ct. H.R. (ser. C) No. 63 (1999)).

> to develop under decent conditions;[151]

and that

> true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.[152]

In *Children's Rehabilitation v. Paraguay,*[153] a number of minors in state custody suffered injuries resulting from the unsanitary and inhumane conditions that prevailed in the institution in which they were interned. In this recent case, the Court affirmed that both the right to life and the right to physical integrity contain economic, social, and cultural elements, particularly with respect to children.[154]

C. CONTRAST: THE DIRECT APPROACH

Both of the indirect approaches discussed above for advancing economic, social, and cultural rights—by applying a non-discrimination principle, or by seeking to incorporate economic, social, and cultural elements within the scope of justiciable civil and political rights—may be contrasted with a direct approach, in which advocates allege violations of provisions of human rights instruments that specifically refer to economic, social, and cultural rights.[155] To date, the direct approach has met with little success for a variety of theoretical, practical, and political reasons that we discuss throughout this Article. Though petitioners before the Court have claimed violations of Article 26—the only Convention article specifically referring to economic, social, and cultural rights—in several recent cases,[156] the Court has refused consistently to adjudicate these claims.

In *Five Pensioners*, the Court reasoned that economic, social, and cultural rights have both an individual and a collective dimension, and that any analysis of state compliance with its obligation to undertake progressive development of economic, social, and cultural rights must consider:

> the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population bearing in mind the imperatives of social equity, and

151. *Id.* para. 137(7).

152. *Id.* para. 137(8). *See also* Children's Rehabilitation vs. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112 para. 158 (2004).

153. Children's Rehabilitation v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112 (2004).

154. *Id.* para. 149.

155. Such provisions include Article 26 of the American Convention, various provisions of the American Declaration, and the totality of the San Salvador Protocol.

156. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003); Children's Rehabilitation v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112 (2004).

> not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.[157]

The Court's brief analysis leaves no doubt as to its intention to limit the scope of Article 26 as a basis for the protection of *individual* economic, social, and cultural rights. In fact, the Court seems to have precluded consideration of Article 26 violations in any contentious case. On the one hand, its jurisprudence clearly establishes that it is competent to hear contentious cases only where individual victims or, at most, discrete, clearly identifiable groups of victims have been injured.[158] On the other hand, it appears, in *Five Pensioners*, to be saying that Article 26 violations can be determined only with respect to the state's population as a whole.

In *Children's Rehabilitation v. Paraguay*,[159] the Court again declined to adjudicate the Article 26 claims.[160] This time, the Court merely found that resolution of the Article 26 claims was unnecessary in light of its consideration of the economic, social, and cultural elements inherent in the claims based on Articles 4 (the right to life) and 5 (the right to physical integrity).[161]

As we will discuss in detail in the following section, petitioners in several cases pending in the Inter-American system have taken the direct approach, alleging violations of Article 26 of the Convention, of the San Salvador Protocol, or of provisions of the American Declaration that deal with economic, social, and cultural rights. It remains to be seen how the Commission and Court will address these claims in light of the emerging trend in favor of indirect adjudication.

IV. FUTURE DEVELOPMENT

At this writing, both the Commission and the Court have before them several petitions seeking determinations regarding abuses of economic, social, and cultural rights in which to develop its treatment of these issues. In these cases, the technique most frequently employed by petitioners is the presentation of "hybrid" petitions, which present violations of both civil and political *and* economic, social, and cultural rights. The alleged violation of the civil or political right or rights guarantees initial access to the Inter-American system and facilitates the

157. *Id.* para. 147.

158. *See* OC-14 Ad. Op., Inter-Am. Ct. H.R. (ser. A) para. 49 (1994). ("The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions.").

159. Children's Rehabilitation v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112 (2004).

160. In *Five Pensioners*, the Commission brought the Article 26 claim. In *Children's Rehabilitation*, the Commission declined to allege violations under that Article, but the representatives of the victims did choose to bring the claim. This suggests to us that the Commission may have retreated from its earlier, more aggressive posture.

161. Children's Rehabilitation v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112, para. 225 (2004).

consideration of the alleged violations of economic, social, and cultural "elements" of these rights.

In *Menéndez, Caride et al. v. Argentina*,[162] a case pending before the Commission that presents similar claims to those adjudicated in *Five Pensioners*,[163] a group of retirees whose pensions were discontinued allege the violation of rights enshrined in the American Convention (Articles 8 (judicial guarantees), 21 (property), 24 (equal protection) and 25 (effective remedy)), as well as of rights recognized in the American Declaration (Article XI (to the preservation of health and well-being) and Articles XVI, XXXV and XXXVII (to social security, in relation to the obligation to work and contribute to social security)).

The petitioners assert that the right to property includes the right to receive a dignified pension, i.e., that one's lifetime of work creates property that cannot be unduly seized by the state. The petition exemplifies both the "elements" approach, in that it seeks to recognize the right to receive a pension (an economic right) as a component of the right to private property, and the direct approach, in that it asserts specific economic, social, and cultural rights recognized in the Declaration but not contained in the Convention. The Court upheld the Convention-based position in *Five Pensioners*, in which domestic law expressly created an "acquired right" to certain social security payments, but it remains to be seen whether the Commission will reach the same result in *Menéndez*, where petitioners do not allege the existence or violation of any such right expressly created under domestic law.

In *Odir Miranda v. El Salvador*,[164] petitioners similarly take an "elements" approach, asserting that the right to life should be construed broadly to include questions of health, and that states parties to the American Declaration and the San Salvador Protocol have the affirmative duty to guarantee the right to health as provided for in these two instruments.

Odir Miranda learned that he was HIV-positive in 1997 after being hospitalized at the Salvadoran Social Security Institute (Instituto de Seguridad Social—ISSS). After his health improved markedly following a course of anti-retroviral therapy, Miranda petitioned the ISSS to purchase and administer the elements of the anti-retroviral treatment. After the ISSS denied his petition and domestic recourse proved inadequate, Miranda submitted a petition to the Inter-American Commission seeking to compel the State to provide the treatment.

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162. Menéndez v. Argentina, Case No. 11.670, Inter-Am. C.H.R., Report No. 03/01, OEA/ser. L./V./II.111, doc. 20 rev. (2001).

163. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

164. Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2000).

In the case pending before the Commission, Miranda and other alleged victims contend that El Salvador is responsible for the violation of the rights to life (Article 4), humane treatment (Article 5), equal protection before the law (Article 24), judicial protection (Article 25), and economic, social, and cultural rights (Article 26) under the American Convention. In addition, the petitioners allege violation of Article 10 of the San Salvador Protocol and Article XI of the American Declaration. Petitioners assert that

> the right to life encompasses much more than not dying as a result of action or negligence attributable to the State, in accordance with the rules of international law. The right to life, in that broader sense, presupposes, *inter alia*, that a person lives under conditions that are conducive to his well being.[165]

The petitioners maintained that the State's failure to provide anti-retroviral treatment violated Article 10 of the San Salvador Protocol and Article XI of the American Declaration, which guarantee the right to health, and that these instruments, in conjunction with the provisions of Article 26 of the American Convention (progressive development of economic, social, and cultural rights), give rise to an "immediate legal obligation." They argue that the State must "conduct all acts ... necessary to improve health, leading to the highest level of physical, mental, and social well being through the use of modern advances and scientific medical discoveries."[166]

The Commission found the case admissible[167] but specifically stated that it would not determine El Salvador's responsibility under Article 10 of the San Salvador Protocol, construing Article 19(6) of that instrument to limit the Commission's competence to determinations on alleged violations of Articles 8(a) and 13 only.[168]

The Commission's position with respect to violations of Article 26 was less clear. The Commission appeared to consider these allegations on a similar footing to those involving the violation of certain civil and political rights.[169] Since the Commission's decision, however, the Court has held, in the *Five Pensioners*[170] case, that it would *not* adjudicate alleged violations of Article 26 in individual cases. In light of the Court's holding, it is unlikely that the Commission will sustain the petitioner's allegations in this regard.

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165. *Id.* para. 24.

166. *Id.* para. 26.

167. *Id.* para. 49(1).

168. As discussed above, the San Salvador Protocol specifically allows for individual complaints to be brought under articles 8(a) and 13 (pertaining to certain labor rights and the right to education).

169. "In the view of the Inter-American Commission, these allegations must be examined during the phase related to the merits of the case, in order to determine whether the facts reported violated articles 2, 24, 25 and 26 of the American Convention." *Id.* para. 45.

170. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

In the meantime, Odir Miranda and his case have gained international renown among HIV/AIDS activists, and progress has been made towards the State's fulfillment of his demands. In February of 2000, the Commission granted precautionary measures on behalf of Odir Miranda and twenty-six other members of the Asociación Atlacatl, in which it urged the State of El Salvador to provide them with treatment and antiretroviral drugs, as well as hospital, pharmacological, and nutritional care.[171] In June of 2000, the Board of Directors of the ISSS authorized the procurement of the antiretroviral therapy for persons who are HIV-positive or have AIDS, and the ISSS began providing treatment.[172] It is impossible to say whether the State would have implemented the Commission's request in the absence of the concerted efforts by HIV/AIDS activists, or, conversely, whether the State would have heeded the activists' demands in the absence of a request by the Commission. What this case illustrates is the potential success of an integrated strategy that includes individual case litigation and also measures to raise grassroots support for a particular issue.

As we illustrated in Part III, recent decisions affirm that economic, social, and cultural rights are indivisible from civil and political guarantees. Further, the Court is open to construing both substantive and procedural provisions liberally, in such a way as to protect economic, social, and cultural rights through implementation of norms traditionally understood as guaranteeing civil and political rights. These decisions also suggest a reluctance to enforce economic, social, and cultural rights through the application of provisions that clearly establish such rights, but that provide no definite grounds for state responsibility, or that fail to establish a mechanism for enforcement, such as Article 26 of the Convention, or the majority of the San Salvador Protocol (with the exception of Articles 8(a) and 13). In light of these decisions and of real-world progress that has been made on these issues, we can construct a goal-oriented strategy for future development that effectively utilizes the tools available in the Inter-American system. Below, we analyze the various options available to advocates, weighing the pros and cons of each.

A. Expansion of Article 26: A Suspect Option

One avenue by which economic, social, and cultural rights may be promoted through the case law of the Inter-American system is through an expansive interpretation of Article 26 of the American Convention. Although the Commission has not precluded the possibility of finding states responsible for violations of Article 26, the Court's holding in *Five*

171. *See* Annual Report 2000, Inter-Am. C.H.R., OEA/Ser./L/V/II.111, doc. 20 rev. 16 (2001).
172. *Id.*

Pensioners substantially limits the extent to which either body can determine, in individual cases, state responsibility for failure to develop economic, social, and cultural rights progressively.

There can be little doubt that a broad interpretation of Article 26 along the lines requested would be the easiest formula for incorporating economic, social, and cultural rights in the case law of the Inter-American system. However, the Commission should, for a number of reasons, proceed with great caution should it pursue this line of legal reasoning.

First is the fact that Article 26 enumerates no specific rights enforceable on an individual basis.[173] In fact, the *travaux preparatoires* leading up to the final draft of the Convention suggest that there was some debate about whether the instrument should include protection for economic, social, and cultural rights at all.[174] The failure to provide specific protection for these rights appears to be not an oversight, but rather a conscious effort to weaken state obligations in this respect.[175] Indeed, the Commission itself has noted that Article 26 tends to view "economic, social, and cultural rights as objectives of development and not as values in themselves."[176]

Second, to the extent one may nonetheless argue that Article 26 is ambiguous as to the creation of enforceable rights, the OAS appears to have resolved these doubts when it drafted and adopted the San Salvador Protocol. Unlike Article 26 of the Convention, the San Salvador Protocol, which specifically addresses the enforceability of economic, social, and cultural rights in the Americas, clearly establishes the circumstances in which a violation may be considered in a petition to the Inter-American Commission on Human Rights. Article 19 states that violation of articles 8(a) and 13 give rise to the right of individual petition to the Inter-American Commission on Human Rights.[177] As we have

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173. *See* Matthew Craven, *Economic, Social, and Cultural Rights*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 299 (David J. Harris & Stephen Livingstone, eds. 1998).

174. *See id.* at 297–301.

175. *See id.* at 297. Craven notes that "Although each of the draft Conventions presented by the American Committee of Jurists, by Panama, and by Chile, gave extensive recognition to economic, social and cultural rights . . . the final 'working draft' presented by the inter-American Commission virtually excluded all reference to them." *Id.* (internal citations omitted).

176. Annual Report 1983–84, Inter-Am. C.H.R., ch. V(II) para. 4, OEA/ser. L/V./II.63, doc. 10 (1984).

177. Article 19(6) of the San Salvador Protocol states:

> Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

Protocol of San Salvador, *supra* note 7, art. 19(6).

noted, the clear implication of that article is that violations of the other articles of the San Salvador Protocol *do not* give rise to the right of individual petition to the Inter-American Commission.

The Inter-American Commission itself echoed this understanding of Article 19 of the San Salvador Protocol in its May 2001 revision of its Rules of Procedure.[178] Article 23 of those Rules states:

> Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *in accordance with their respective provisions*, the Statute of the Commission, and these Rules of Procedure.[179]

The text on "their respective provisions" refers to Articles 8(a) and 13 of the Additional Protocol in the Area of Economic, Social and Cultural Rights[180] and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,[181] each of which limits access to the Commission to the violation of certain rights.

The Court, unlike the Commission, exercises the luxury of reviewing each case over a period of months. That body is conscious of the import of its sentences both as the final word within the Inter-American system (i.e., the role of structuring jurisprudence for the Commission) and as measures of vast political significance. This fact, among others, has made the Court somewhat more cautious in establishing new precedents. Notwithstanding its interest in advancing the promotion of economic, social, and cultural rights, the Commission, in construing Article 26 of the American Convention, must be careful not to establish case law that will fail to survive the scrutiny of the Court.

B. The Wiser Path: Restrained Development of Precedent in Conjunction with Mobilization Strategies

For a number of practical, political, and historical reasons,

178. Regulations of the Inter-Am. Comm'n on Hum. Rts., *available at http://www1.umn.edu/humanrts/oasinstr/iachrregulations.html.*

179. *Id.* art. 23 (emphasis added).

180. *Protocol of San Salvador*, *supra* note 7.

181. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, entered into force Mar. 5, 1995, 33 I.L.M. 1534.

governments tend to support the view that economic, social, and cultural rights should not be afforded the same protection given to civil and political rights. To the extent that advocates seek to achieve realistically enforceable Court sentences on economic, social, and cultural rights, they should be attentive to governmental resistance to the enforcement of such rights. A sentence imposing obligations on governments based exclusively on a broad interpretation of Article 26 and its use as a vehicle to render other treaty obligations immediately justiciable may be doomed to failure and is likely to provoke extreme reactions from the member states of the OAS.

1. *General Principle: Towards an Evolutionary Interpretation of Human Rights*

Expansion of human rights norms in the Inter-American system will remain on relatively firm ground to the extent that it may be justified as legitimate construction of evolving norms of international human rights law. On at least three occasions, a majority of the Inter-American Court has invoked "evolutionary" interpretation as the justification of expanding the reach of existing human rights norms. In the *Awas Tingni* case, the Court held that human rights evolve, and that elements not considered present within given rights at their drafting may be found to be present in later interpretations.[182] Similarly, as Judge Cançado Trindade wrote in his concurring opinion in the *Villagrán Morales* case, the Court had already found,

> in its 16th Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), that the interpretation of an international instrument of protection ought to 'accompany the evolution of times and the present-day conditions of life', and that such evolutive interpretation, in accordance with the general rules of interpretation of treaties, has contributed decisively to the advances of the International Law of Human Rights.[183]

Indeed, in OC-16, the Court wrote:

> That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court . . . and the European Court of Human Rights . . . have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.[184]

Thus, the Court has established a clear line of precedent regarding

182. *See* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 147 (2001) (applying an evolutionary understanding of interpretation of human rights treaties to find the right to communal ownership present in the right to property).

183. Villagrán Morales v. Guatemala ("Street Children" Case), Inter-Am. Ct. H.R. (ser. C) No. 63, para. 5 (1999) (Cançado Trindade, J. and Abreu-Burelli, J., concurring) (internal citations omitted).

184. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Ad. Op. OC-16/99 , Inter-Am. Ct. H.R. (ser. A) para. 114 (1999).

evolutionary interpretation. Future petitioners and the Commission must be attentive to this guidance by the Court. New lines of precedent must be the logical culmination of trends in international human rights law, rather than innovative (and sparsely supported) constructions. Below, we set forth five such trends.

a. *Non-Discrimination*

As illustrated in Part III above, the non-discrimination principle has been a valuable basis for extending economic, social, and cultural rights, particularly in circumstances in which these rights would otherwise not be the basis of any protection. The advantage of using the non-discrimination principle is that petitioners, the Commission, and the Court may rely on a fundamentally *civil* right to expand protection of economic, social, and cultural rights. In order to make effective use of this principle, petitioners must seek out situations that allow for expanding constructions of the idea of discrimination. As we set out in the proposed cases, allegations of differential resource allocation to communities with disparate impact on different ethnic groups, for example, may be an important means of forcing change in governmental policies concerning a wide range of economic, social, and cultural rights. In these cases, as in others suggested below, this litigation should be undertaken jointly with social movements to ensure coordination of strategies and maximum practical impact.

b. *Hybrid Cases*

A second guiding principle in the extension of economic, social, and cultural rights, is what we would term the "hybrid case" approach. By this, we refer to cases in which the violations denounced by petitioners and treated by the Inter-American system include abuses of both civil and political, and economic, social, and cultural rights. In other words, those cases in which the situation denounced contains intertwined elements of both classes of rights provide greater possibilities for successful implementation. The advantage here is that the existence of violations of civil and political rights guarantee that a case will be considered admissible by the system. This admissibility will allow the system to apply the other interpretative principles outlined herein. At the same time, even if the Commission and Court are unable to adjudicate the economic, social, and cultural rights allegedly violated due to mandate limitations, their examination of the case may well provide the pressure necessary for the entire matter—civil and political as well as economic, social, and cultural rights—to be placed on the agenda of the state.[185]

185. For example, international pressure (through the use of the Inter-American system, among other techniques) applied in the 1996 El Dorado dos Carajás massacre of nineteen landless peasants by Brazilian police forced authorities to address not only issues related to police impunity and rural

c. *Economic, Social, and Cultural Interpretations of Civil and Political Rights—The Elements Approach*

Within this concept of hybrid rights, special attention must be paid to the economic, social, and cultural elements of civil and political rights. In this way, cases that present facts amounting to the abuse of particular economic, social, or cultural elements of a particular civil or political right will allow the Court to consider these elements without the need for an express finding with respect to economic, social, or cultural rights. This idea may also be expressed in terms of the harmful incidence of violations of economic, social, or cultural rights on one or more civil or political rights. In this way, economic, social, and cultural "elements" may be addressed, either as the underlying factors giving rise to violations of civil or political rights, or as elements inherent in civil and political rights that have been violated.

In the Inter-American context, the "elements" approach has resulted in expansive construction of the right to property[186] and the right to life.[187] An example of this type of interpretation is found in the analysis of the right to life in Judge Cançado Trindade's concurring opinion in *Villagrán Morales*.[188] There, Cançado Trindade analyzed the right to life as including a much broader set of guarantees than those envisioned by a strictly civil rights interpretation. His vision includes elements of economic, social, and cultural rights and is not limited to the classic, restrictive vision that contemplates the guarantee of life only within civil rights parameters.

Similar reasoning may be applied to other traditionally civil and political rights to include in their scope elements of economic, social, and cultural rights. Thus, for example, an expansive interpretation of the right to physical integrity, a civil right, could include the right to medical treatment, an economic, social, and cultural right. An expansive view of the right to political participation might include the right to be literate, and thus the right to be educated. This approach is considered in greater depth in the proposed hypothetical cases.

d. *Specification of Situations of Abuse and of Victims*

By this fourth guideline, we refer to the preference for clearly specified violations and clearly identified victims, rather than amorphous

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violence, but also the underlying economic, social, and cultural rights violations, including the need for greater land reform and credit for landless squatters and farmers. *See* El Dorado dos Carajás, Petition 11.820, Inter-Am. C.H.R., Report No. 4/03, OEA/ser. L./V./II.118, doc. 5 rev. 2 (2003).

186. *See, e.g.*, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001); Baena Ricardo (270 Workers v. Panama) Inter-Am. Ct. H.R. (ser. C) No. 72 (2001); "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

187. *See, e.g.*, Villagrán-Morales v. Guatemala ("Street Children" Case), Inter-Am. Ct. H.R. (ser. C) No. 63 (1999) (Cançado Trindade, J. and Abreu-Burelli, J., concurring).

188. *Id.*

violations and undefined classes. In other words, a petition denouncing the violation of the right to education of a particular community (for instance, an indigenous community or a group of settled landless laborers) will have a greater chance of implementation than a decision finding a general violation of the right to education affecting all children in a particular nation or political subdivision. While one may prefer the more general ruling, given that it implies the possibility to alter state policy at a broader level, in practice, we may anticipate that such a ruling might not be applied at all by the state affected. On the other hand, a more limited decision that could be implemented by the state affected, would establish the same precedent, and would create international legal bases for the efforts of local rights groups and progressive movements to implement the principles included in the given sentence on a wider basis. The decision, of course, would also serve as precedent for legal activists in other American States.

Commentators Abramovich and Courtis have emphasized the need to focus on particular victims rather than on generic violations in domestic cases, and their analysis is instructive here:

> [I]n many cases, the State's failure to comply can be reformulated in terms of concrete and individualized violations rather than generically. The generic violation of right to health can be recast or reformulated by the articulation of a particular action, led by an identifiable individual, that gives rise to a violation, such as the non-provision of a vaccine or refusal to provide medical services necessary for the individual's life or health.[189]

Petitioners seeking to employ this principle must be careful to debate thoroughly and to consider fully the choice of victims and communities in bringing cases before the Inter-American system. Too often, rights groups choose to represent victims and groups affected based on convenience—either in locating the person or persons affected, amassing evidence, or working with counsel. While these criteria may be important, potential petitioners must ask themselves whether the victim(s) selected are representative of the broader class, whether they are tied to social movements capable of exerting pressure on governmental authorities, and whether the media are likely to find the selected petitioner an attractive one for advocacy.

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189. Abramovich & Courtis, *supra* note 114, at 301 (authors' translation). The original Spanish text reads:

> en muchos casos el incumplimento del Estado puede reformularse en términos de violación individualizada y concreta, en lugar de forma genérica. La violación general al derecho a la salud puede reconducirse o reformularse a través de la articulación de una acción particular, encabezada en un titular individual, que alegue una violación producida o la no producción de una vacuna, o por la negación de un servicio médico del que dependa la vida o salud de esa persona . . . .

e. *Focus on Rights with Unquestioned Access*

Here, we refer to the preference for denunciation and adjudication of violations of rights that clearly provide access to the individual petition system. To date, by means of the San Salvador Protocol, petitioners may denounce violations of Article 8(a), concerning associational labor rights, and Article 13, which protects the right to education. We can expect less resistance from states to decisions upholding these rights than to determinations extending existing jurisprudence to other economic, social, and cultural rights.

Cases focusing on these rights, denounced and analyzed within the limits of these Articles, will have the greatest chance of implementation by states parties against whom decisions are issued by the Commission or the Court.

C. Proposed Hypothetical Cases

Before setting out proposed cases designed to maximize the efficient use of the Inter-American system, it will be helpful to emphasize a few of the principles that should orient a strategic litigation approach. First, we must recall that the Inter-American system is one of limited access and limited resources. As such, petitioners should not look to the system as an arbiter of disputes but rather as a mechanism for producing jurisprudence with potentially sweeping policy implications. In this regard, petitioners must focus on the potential impact that the litigation of cases may have beyond the parties involved.

Second, one must understand the structural limits of the system and the political forces (e.g., reactionary states) that would gladly seize on poorly structured precedent as a basis for non-implementation of the system's rulings, as well as to undermine the already limited resources and political support afforded the Commission and the Court.

Third, petitioners must be clear about their objectives. This Article proposes a concrete litigation strategy designed to foster respect for economic, social, and cultural rights. To this end, it may be necessary in some cases to emphasize civil and political rights and to seek expansive interpretations of these rights, rather than to force the Commission and Court to recognize economic, social, or cultural rights as such, without sufficient basis in law. In other words, it may be more efficient for the system to recognize the right to medicine or treatment in a particular matter as an element of the right to life or the right to physical integrity than to force the system to recognize, through the individual petitions process, economic, social, and cultural rights not deemed ripe for international litigation by states. In short, petitioners should be more interested in advancing *guarantees for victims* than in advancing *rights on paper.* This Article contends that a strategy that focuses on expansive interpretation of civil and political rights provides greater impetus for the

advance of economic, social, and cultural rights within the national legal systems of the Americas by providing guidance for expansive interpretations of civil and political rights, uniformly guaranteed by the constitutions of American States.

Finally, petitioners must understand and respect the subsidiary role of supranational litigation in broader efforts to achieve distributive justice. This understanding and respect requires that potential litigants confer with and accept the decisions of social movements and other actors regarding what issues to address internationally, which victims to represent, and so forth. Potential litigants at the international level must be careful not to set the agenda on their own, based exclusively on legal criteria. Experience demonstrates that international litigation not accompanied by parallel, coordinated campaigns by social movements and/or the media is unlikely to produce effective results. In light of this, we underscore the need for supranational litigators to avoid taking the lead on strategic decision-making regarding the use of the Inter-American system.[190]

Below, we set out strategies based on several hypothetical and real cases that litigants in the Inter-American system may employ to advance respect for economic, social, and cultural rights. We begin with those rights guaranteed by the San Salvador Protocol and then proceed to those for which direct access has not been explicitly recognized by the treaties of the system. With this second group, our focus is on the protection of *elements* with economic, social, and cultural implications, rather than on formal acceptance of the rights themselves.

1. *The Right to Education*

Given the recent entry into force of the San Salvador Protocol, petitions alleging violations of the right to education now enjoy a solid basis for acceptance by the Inter-American system. Article 13 of the San Salvador Protocol sets out the right to education in some detail. Article 19(6) assures access to the Inter-American system in the case of violations of the right to education.[191]

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190. Of course, once litigation has begun, strategic decisions regarding litigation should involve counsel. But even at these stages, legal concerns should not be the only factors employed in designing advocacy plans.

191. Protocol of San Salvador, *supra* note 7, art. 19(6). Article 13 of the Right to Education includes a series of guarantees, with differing levels of immediacy in their application:

> Article 13—Right to Education
>
> ....
>
> 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
>
> a. Primary education should be compulsory and accessible to all without cost;
>
> b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate

We may imagine a clear-cut case of abuse of Article 13 in which an individual child or group of children is denied access to free public education due to any of a series of factors that may range from the absence of a school within a reasonable distance from a given community to excessively high fees for registration or the purchase of mandatory texts. No doubt, it is important that these cases be brought to the attention of the Commission to enable it to make clear pronouncements about the nature of the state's obligation to provide free, basic education to all citizens. Beyond this, however, it will be important to develop cases that allow the Commission and Court to speak to the contours of this right. Thus, cases that focus on particular elements of free education (such as required purchase of uniforms or textbooks, failure to provide free meals to students, etc.) will permit the system to establish useful precedents on the range of the rights guaranteed in Article 13.

On a second level, one may imagine a situation in which resources are distributed to public school districts or to individual schools on a very unequal basis. One may further imagine that these inequalities correspond to divisions between and among neighborhoods which, in turn, manifest different socio-economic and ethnic characteristics. For example, it will not be difficult for us to imagine two or more schools or school districts in neighborhoods of different social classes somewhere in the Americas (preferably in a state that has ratified the San Salvador Protocol). Further, let us imagine that in the poorer neighborhood, the resource allocation per student is significantly lower than in a middle or upper class neighborhood in the same city. We may also imagine that the two neighborhoods have very different racial compositions. In the poorer neighborhood, we may imagine a greater percentage of persons of African and/or indigenous descent, while in the wealthier neighborhood, residents would be lighter-skinned.

On this set of facts, petitioners may present a powerful case of violation of the principle of non-discrimination in combination with the right to education. Were the Commission and Court presented with such a case, they would be on firm ground were they to find a violation in the unequal distribution of resources to the two communities. Further, as a remedy, the system could order that the state afford roughly equal resources to the communities. The state would be required to distribute

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means, and in particular, by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

educational resources on a more equal basis.

Or suppose that in a given country, the state maintains systems of free elementary and university education. Suppose further that the level of expenditure per student in the university system exceeds (by a factor of ten to twenty) the expenditure per student in the elementary school system. We may imagine that the composition of the student body in public schools at the elementary school level is very different from the composition at the university level. At the former level, the student population reflects the racial diversity of the country. At the latter level, the student population reflects the highest social classes (and we may reasonably suppose that this population is disproportionately lighter skinned and largely excludes persons of African and indigenous descent). Let us assume that the state with these differences at the elementary school and university level does not maintain effective affirmative action programs to guarantee access to superior education to persons from historically disadvantaged groups.

On these facts, a petition alleging violation of the right to education in conjunction with the principle of non-discrimination would enable the system to reach conclusions with potentially revolutionary policy implications. To make the case stronger, one may imagine a petition that juxtaposes two communities in the same geographic area. In the first, a poor community, composed primarily of persons of African or indigenous descent, some number of children do not have access to elementary school education. At the same time, in an adjacent or nearby upper-middle class community composed largely of lighter-skinned persons, a disproportionate number of residents attend free public university.

On these facts, a petition alleging violation of the non-discrimination principle in conjunction with the right to education would provide the Inter-American system an opportunity to evaluate—through the individual case mechanism—the educational policies of a given state.[192] A word of caution is warranted here. These hypothetical facts—which no doubt exist in Brazil and elsewhere in the Americas—involve highly volatile issues in which privileged classes may react to perceived attacks on their children's access to free university education. Before undertaking an international litigation strategy that targets the status

192. One case pending before the Inter-American system that addresses the issue of discriminatory treatment in access to education is *Dilcia Yean and Violeta Boscia v. Dominican Republic*, Case 12.189, Inter-Am. C.H.R., Report No. 28/01, OEA/ser. L./V./II.111, doc. 20 rev. (2000). In that matter, petitioners argue that the discriminatory refusal to issue birth certificates to two girls born in the Dominican Republic to Haitian mothers led to their inability to enroll in school and thus violation of their right to education. The *Yean and Boscia* case, though likely to force consideration of the Dominican Republic's discriminatory treatment of Haitian-Dominicans, may not result in judicial pronouncement on inequity in Dominican education more generally.

quo, petitioners must carefully diagnose the potential cases and consult social movements with which they may partner. Litigating these types of cases without ensuring sufficiently organized support networks and supportive media may lead to disastrous results.

2. *The Right to Food*

Let us imagine an individual, or group of individuals, who receive less than an adequate share of calories, protein, carbohydrates, or other essential nutrients on a regular basis. Let us further assume that this group of persons informs the relevant authorities of its circumstances and that these authorities fail to take measures either to *respect* or to *ensure* this right. Let us further assume that the authorities have the resources necessary to provide for the nutritional needs of the group in question. As a direct consequence of this failure, one or more individual members of this group die and/or suffer from otherwise preventable diseases. We may also assume that one or more members of this group fail to develop as they would have had they received the adequate nutritional intake that fate, and official failure has denied them.

We may view this situation as a violation of the right to food. However, given that the right to food does not provide the basis for an individual petition to the Inter-American system, regardless of whether domestic remedies have been exhausted, we would be unable to help these victims. On the other hand, we may just as easily characterize the situation as a violation of the right to life, in the case of the member or members of the group who have died due to inadequate nutrition, or as a violation of the right to physical integrity, in the case of those who have suffered from otherwise curable diseases. Again, as in the previous hypothetical cases, petitioners should ensure the involvement of social movements and supportive media prior to embarking on the international litigation strategy.

3. *The Right to Health*

In the case of *Odir Miranda*,[193] the issue of the right to health has been placed squarely before the Commission. In that matter, the petitioners have argued that the state's failure to provide adequate medication for persons suffering from HIV and AIDS constitutes a violation of the right to health. The petitioners have argued that the right to health is guaranteed, through Article 26, in international treaties ratified by El Salvador. They have also placed before the Commission the issue of violation of the right to life. As we have argued above, this latter line of argument finds more solid support in existing international precedent both within and without the Inter-American system.

193. Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01, OEA/ser. L/V/II.111, doc. 20 rev. (2000).

We may imagine other instances in which a broad interpretation of the right to life (or the right to physical integrity) may include elements of protection, guarantee, or provision of health services, and thus where the failure to protect, guarantee, or provide such services, constitutes a violation of the right to life. We may imagine, for example, an instance in which an individual or group of children does not have access to vaccines. Let us further imagine that the failure to provide these vaccines is not the result of lack of resources on the part of the state and that one or more of the children who do not receive necessary vaccines suffer from preventable illness leading to death. As in the hypothetical case regarding the right to nutrition, we may argue that the failure to provide health services (in this case, vaccines) is the direct cause of serious illness and death, and thus constitutes a violation of the rights to physical integrity and health. Selecting a child or children as the petitioner in advocating the right to well-being (either to physical integrity or, if applicable, to life) would be a wise strategy from both legal and advocacy perspectives. In legal terms, international human rights law provides special protection and guarantees for children, thus enhancing the chances of a victory on the merits. From a broader advocacy perspective, the focus on children generates a broad range of allies both within organized social groups and in the mass media.[194]

4. *Right to Housing: Focus on Correcting Injustice in Housing Policy*

We may imagine as potential petitioners a group of poor urban dwellers in makeshift houses established in the less desirable areas of a Latin American city. These residents may establish homes in hillside communities, on steep inclines without adequate structural support. It is likely that many of these shelters will not support the heavy rains that afflict subtropical environments. Indeed, a number of such houses are washed away every year, in torrential summer showers, leaving many dead and injured. Let us imagine that these residents have petitioned local authorities for assistance to build adequate structural support for their homes or, in the alternative, housing or income subsidies to rent or buy adequate shelter elsewhere. Let us further assume that these pleas have failed to provoke the requested response from authorities and, also, that the authorities' failure is not the result of lack of resources.

194. One issue that has mobilized significant constituencies in Latin America, particularly in Brazil, has been HIV/AIDS. *See* Jane Galvão, "Community Mobilization and Access to HIV/AIDS Medicines: The Brazilian Experience," paper presented at Harvard Medical School (Nov. 3, 2003) (attributing relative success of efforts to expand access to HIV medication to social movement's organization and strategic partnership with government authorities). Regardless of the focus of the case used to advance the Court's jurisprudence and state practice on health care, it is essential that a local constituency capable of mobilizing authorities exist and that litigants coordinate efforts with social movements and forces.

The picture that we have described no doubt constitutes a failure to ensure the right to housing. But it may also constitute a violation of the right to life or the right to physical integrity of persons killed or injured in predictably violent rains. Advocates may argue these claims in this context.

An alternative approach to advancing the right to housing by denouncing injustices in housing policy is through application of the non-discrimination principle. Let us imagine a state that maintains, at a limited or more comprehensive level, public housing programs. These programs may range from regulation of the housing market, to tax subsidies for housing development, to direct provision of housing through construction programs of shelter for persons of limited means. We may imagine a number of situations in which this regulation, guarantee, or provision of housing is tainted by some degree of discrimination. In a particularly clear case, we may imagine a public housing program in which construction of houses is tied to political affiliation in a particularly obvious and vulgar fashion.[195]

On these facts, we may imagine an individual or group of individuals that has sought and has been denied access to a particular housing program based on its lack of affiliation with the relevant (ruling) party of a political coalition. Here, a petitioner denied access to participation, in other words, a petitioner denied the right to housing, ordinarily would not be able to petition directly to the Inter-American system given that the right to housing is not a right for which the right to petition is recognized either in the American Convention or the San Salvador Pact. However, following the precedent of the European system, set out in the *Abdulaziz,*[196] and *Schuler-Zgraggen* v. *Switzerland*[197] cases, and the case law of the universal system in *Zwaan de Vries v. the Netherlands*,[198] the Inter-American system could determine that the failure to provide housing rights on a discriminatory basis constitutes a violation of the American Convention *even though immediate access for violation of these rights is not afforded by the norms of the system.*

CONCLUSION

Supranational litigation has been, and will continue to be, an

195. It would be difficult to imagine a situation in which there were absolutely no political element in the choice of which communities would benefit from state investment in low-cost or free housing; thus, we emphasize in this hypothetical case, the existence of an evident link between political affiliation and participation in a given housing program.

196. Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) (1985).

197. Schuler-Zgraggen v. Switzerland, 263 Eur. Ct. H.R. (ser. A) (1993).

198. Zwaan de Vries v. The Netherlands, Communication No. 182/1984 (Human Rights Committee), para. 12.4, available at http://www1.umn.edu/humanrts/undocs/session42/182-1984.htm (last accessed Dec. 1, 2004).

important tool in the efforts to promote respect for economic, social, and cultural rights in the Americas. But it is merely one tool among many available to social activists. If employed unwisely—indiscriminately, excessively, or without due consideration for non-legal factors that influence economic, social, and cultural rights—it carries the potential to produce more harm than good. We have sought to demonstrate the circumstances that have come together to create a context that requires advocates of economic, social, and cultural rights in the Americas to exercise caution and restraint to be effective. These circumstances include severe limits on access to the Inter-American system, the fragile nature of supranational bodies, and the potential for non-compliance by states.

Critiques developed in the realm of social justice in the United States, as well as recent analysis of the proposed individual case mechanism of the Committee on Economic, Social and Cultural Rights, have raised concerns about the potential for rights-based litigation to result in counterproductive "queue jumping." We do not subscribe fully to these views; instead, we argue that litigation *has* a role to play, provided practitioners engage international oversight mechanisms as part of broader strategies that also involve social movements, the media and other forms of pressure.

Litigation as part of such broader campaigns may advance economic, social, and cultural rights even without litigating them directly. Within these constraints, international litigation may be effective. We maintain that when supranational litigation takes on economic, social, and cultural rights directly, it should be firmly grounded in solid precedent and doctrine, effectively eliminating the possibility of state challenge to its legitimacy.

Finally, we have attempted to chart a course that reflects a pragmatic approach, in which litigation is closely tied to vigorous social movements and non-legal campaigns, providing examples of possible cases to be litigated and lines of argument. Our hope in presenting this approach to supranational economic, social, and cultural litigation is not to discourage human rights practitioners from using the Inter-American system as a means of promoting social justice, but rather to encourage them to do so in a thoughtful and responsible fashion. In this way, we suggest, they will enhance their chances of success in their legal battles and also increase the likelihood of effecting real-world change, while maintaining the credibility of supranational oversight mechanisms themselves.

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REJOINDER: JUSTICE BEFORE JUSTICIABILITY: INTER-AMERICAN LITIGATION AND SOCIAL CHANGE

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I. INTRODUCTION

In this issue of the *N.Y.U. Journal of International Law and Politics,*[1] Tara Melish critiques a piece that we published in volume 56 of the *Hastings Law Journal.*[2] That piece, based in significant part on our combined experience working with rights defenders and social justice movements in Latin America for two decades and litigating scores of matters before the Inter-

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The authors would like thank Professor Ryan Goodman, Director of the Human Rights Program, and Tyler Giannini, Clinical Director of the Human Rights Program, Harvard Law School, for their comments, and Daniel Braun, Stephanie Brewer, Fernando Delgado, Jacob Kopas, and Deborah Popowski for their research assistance and thoughtful critiques of earlier drafts of this Rejoinder. We also thank the students in the human rights advocacy course at Harvard Law School, taught by Cavallaro and Binaifer Nowrojee, as well as the students in the human rights advocacy course taught by Clinical Professor Peter Rosenblum at Columbia Law School. James Cavallaro had the opportunity to present this Rejoinder to both groups in the fall 2006 semester; the authors benefited from the comments and critiques of those two seminars. Finally, we would like to thank the editors of this journal for their critical review of this text and their valuable suggestions.

1. Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171 (2007) [hereinafter, Melish, *Rethinking*].

2. James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2004). In the text, we refer to this as the "Hastings" piece or article, or as *Less as More.*

American Commission and Court, challenged some of the conventional wisdom regarding the expansion of the justiciability of economic, social, and cultural (ESC) rights. We expected that those invested in the system might react strongly. Such appears to be the case with Tara Melish, to whose article we now respond. Though we differ as to the interpretation of recent Court jurisprudence, the main tension between our approaches centers on the role of supranational litigation in promoting social justice. While Melish champions ESC justiciability in the inter-American system apparently in a vacuum, we support an approach to litigation in the system that considers the severe limits (in numerical and political terms) on such litigation, as well as the factors that foster or detract from the impact of determinations of the Commission and Court within Latin American states.

Melish's consistent mischaracterization of our arguments might lead the reader to believe that we are diametrically opposed, with Melish as the champion of ESC rights and Cavallaro and Schaffer as misinformed opponents. In fact, we neither oppose supranational litigation of ESC rights in principle nor misunderstand (as Melish asserts) the principles of petitioning the inter-American system. The false tensions that Melish emphasizes dissipate when one reviews the arguments in our original piece, rather than those she imputes to us, and when one recognizes that Melish's outline of principles to guide the litigation of ESC rights in the inter-American system is merely her proposal and not an accurate description of actual caselaw.

This Rejoinder summarizes our initial position to clarify our common understandings, seeks to correct the record with regard to Melish's misstatement of our argument,[3] responds to her critique where relevant to our initial thesis, and reiterates and refines what we believe to be elements of the wisest path forward to promote social justice through supranational litigation in the inter-American system.[4]

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3. It is not possible, in the limited space available, to respond to each of the mischaracterizations, citations out of context, and overstatements of our position that appear in the accompanying article by Tara Melish. *See generally* Melish, *Rethinking*, *supra* note 1.

4. Unfortunately, throughout her piece, Melish presents an inaccurate understanding of our argument. By taking terms and assertions out of context, overstating our position, and/or by extending the limited framework

II. The Terms of the Debate

A. *The Less As More Argument*

In our Hastings piece, we set out our main thesis in the following terms:

> [G]iven the limited resources of [the inter-American system], the potentially adverse consequences of developing legal standards that may not be applied, and the potential—inherent in the development of novel jurisprudence—for undermining states' respect for the system itself, less frequent and more focused litigation may, in fact, be more valuable. In particular, we urge lawyers and activists in the Inter-American system to recognize the limited and often subsidiary role of legal advocacy in promoting the recognition of economic and social rights and distributive justice. In the end, we conclude that successful promotion of economic, social and cultural rights in the Inter-American system should be incremental, firmly grounded in established precedent, and always linked to vigorous social movements and effective advocacy strategies.[5]

The Hastings piece traces the historical development of civil and political and ESC rights in the inter-American system. It recognizes that, historically (and based on the instruments in force in the system today), civil and political and ESC rights have been treated differently. The piece notes that, while the American Declaration includes specifically enumerated ESC rights, the American Convention includes instead a single, general, and vague provision on ESC rights in article 26. The Hastings piece summarizes the theoretical developments over the past few decades that have demonstrated that the classic distinction between civil and political and ESC rights is fraught with problems;[6] it also asserts that the more coherent under-

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within which each statement is made, much of Melish's piece responds to arguments that we have not asserted. In this brief piece, we will not be able to respond to each of the many times that Melish misstates our position. We encourage anyone who has read her text, however, to read our initial Hastings piece.

5. Cavallaro & Schaffer, *supra* note 2, at 218-19.

6. *Id.* at 252-54.

standing focuses on the similar duties that states have with respect to both sets of rights.

In light of the limits of article 26 of the American Convention, as well as states' possible resistance to jurisprudence not firmly grounded in their understanding of the system's instruments, the Hastings article urges practitioners to seek to advance social justice agendas by relying on the safest grounds possible, though without closing off avenues for further, gradual development. While we question the historical bases that have led the inter-American system to treat civil and political rights and ESC rights differently, we also recognize in *Less as More* that real, meaningful differences in the relevant instruments and caselaw limit the possibility of vindicating ESC rights before the Court through the application of article 26. In light of this, we set out a range of ways that litigants might seek to advance social justice by litigating in the inter-American system. Among the techniques that we highlight are those that focus on ESC elements in civil and political rights, progressive interpretations consistent with article 29 of the American Convention, the non-discrimination principle, and the economic and social rights for which access to the Commission and the Court is recognized in the San Salvador Protocol.

We argue in the Hastings piece that practitioners must come to terms with the limited access the system provides in real, numerical terms, as well as the weakness of article 26, when designing litigation strategies to promote social justice. We emphasize that the on-the-ground impact of the system's determinations has not correlated directly with the merits of those determinations but rather has varied in relation to concurrent social justice organization, media engagement, and civil society strategies.[7] As a consequence of this broader context, we call on practitioners to deploy the system within its limits and to seek means of promoting social justice through well grounded litigation in conjunction with social movements, civil society, and media strategies, rather than through the promotion of isolated and overly broad supranational decisions on ESC rights.

With regard to article 26 and ESC rights, the Hastings piece focuses on matters before the Court or litigation that

7. *Id.* at 240, 251.

might progress to the Court.[8] We recognize that the American Declaration expressly enumerates ESC rights and therefore may constitute the basis of claims to the Inter-American Commission, though not to the Court. We refer in *Less as More* to claims that incorporate both civil and political and ESC rights (through the Declaration, for example) as hybrid cases and encourage litigants to make use of this strategy. In all cases, we urge litigants to work closely with social movements to ensure that efforts to deploy the inter-American system maximize its potential to promote real change on the ground.

B. *Areas of Consensus and Difference*

Based on this understanding of our position (rather than Melish's version thereof), we contend that the main points on which we and Tara Melish concur include:

- First, while historical circumstances have led to a Manichean dichotomy between civil and political rights on the one hand, and ESC rights on the other hand, the theoretical basis for this understanding is flawed. The preferred understanding is that civil and political, as well as ESC rights, include both positive and negative elements and impose on states a spectrum of obligations that range from refraining from direct violations of rights to providing goods and services.[9]
- The American Declaration on the Rights and Duties of Man (1948) sets forth ESC rights in greater detail than the American Convention. Petitions based on the American Declaration may be taken to the Inter-American Commission, though not to the Court. Petitioners may therefore seek to challenge ESC violations to the Commission by drawing on the rights protected in the American Declaration.
- The Inter-American Court has not, to date, embraced any claim, nor issued any decision, in which it found a violation of article 26. While Melish argues that a proper understanding of article 26 requires the Commission and Court to adjudicate viola-

8. *See id.* at 264-68.
9. *See id.* at 252-53.

tions of certain ESC rights, it is clear that the Court has yet to do so.

• Sweeping Court decisions on the progressive implementation of ESC rights for entire states are unlikely to be enforced and would represent overreaching by the Court. Melish refers to this type of litigation strategy as an inappropriate focus on quadrant 4 elements, that is, progressive, result-oriented duties, appropriate only for monitoring but not judicial resolution.[10] In outlining litigation strategies to advance social justice, we too underscore the need to focus on "specific situations of abuse and victims"[11] rather than general conditions affecting broad populations.

• More litigation, if it is not well designed, will promote neither social justice nor the efficacy of the inter-American system. Tara Melish concurs with this analysis, stating in this edition of the *N.Y.U. Journal of International Law and Politics* that she firmly subscribes to the view "that more focused, responsibly-crafted, higher-quality litigation leads to better results, both jurisprudentially and on the ground."[12]

• In order for a claim to be justiciable, it must involve several elements, including concrete injury to specific persons and proximate cause,[13] as well as other aspects demanded by the admissibility rules of

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10. *See* Melish, *Rethinking*, *supra* note 1, at 259-64. The concern that we expressed in *Less as More* about broad findings of ESC rights abuse through article 26 may be framed within Melish's scheme as focusing on quadrant 4 duties. We are less concerned about the potential fallout from an ESC claim framed in quadrant 1 terms. This opinion, however, is largely academic in light of the Court's refusal to permit direct, article 26 access for any ESC claims, at least to date.

11. Cavallaro & Schaffer, *supra* note 2, at 272. There, we call on litigants to seek cases involving "clearly specified violations and clearly identified victims . . . ." *Id.* at 272-73. We go on to note: "In other words, a petition denouncing the violation of the right to education of a particular community . . . will have a greater chance of implementation than a decision finding a general violation of the right to education affecting all children . . . ." *Id.*

12. Melish, *Rethinking*, *supra* note 1 at 179.

13. In one section, Melish devotes several pages to the aspects of petitions not included in our brief sketches of hypothetical cases in *Less as More*. *See id.* at 264-68. The flaws in this aspect of Melish's critique will be discussed in greater detail below.

> the inter-American system. While we do not address these separate requirements, we believe that nothing in our Hastings piece would suggest that we fail to recognize the core elements of an admissible petition in the inter-American system.[14]
>
> • The four quadrant proposal for the litigation of ESC rights as described by Melish presents a coherent repackaging of recent scholarship on ESC rights that may be superior to the existing framework developed by supranational bodies, which tend to construe instruments based on the outdated dichotomy between civil and political and ESC rights.[15]

It would be difficult to overemphasize the importance of recognizing these broad areas of consensus. When one realizes, for example, that our initial Hastings piece *does not question the justiciability of ESC rights in principle*, nor does it dismiss the possibility of litigating ESC rights using the American Dec-

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14. Melish accurately summarizes these elements as:

> (1) proper subject matter jurisdiction (*ratione materiae*) over the invoked norm by the adjudicating body; (2) temporal and spatial jurisdiction (*ratione temporis and loci*) over the facts giving rise to the claim; (3) personal jurisdiction (*ratione personae*) over the parties to the litigation; and, closely related to this latter element, (4) the presentation of a justiciable controversy—i.e., one demonstrating concrete harm to individualized rights-holders and a causal nexus between that harm and the conduct of the state.

Id. at 211. She notes in the accompanying footnote that "[t]he Commission addresses each of these categories, along with those previously mentioned, in every case-related admissibility report it issues. Only when the Commission is satisfied it enjoys proper jurisdiction over the contours of each claim presented to it will it proceed to the merits phase in resolving the case." *Id.* at 211 n.97. We offer readers our apologies if anything in the hypothetical cases section of the initial Hastings piece may legitimately be construed as suggesting otherwise and thank Tara Melish for underscoring the necessity of complying with the requirements of the inter-American system in filing petitions to this system.

15. Again, while we see the benefits of Melish's approach as academics, as practitioners we must recognize that the instruments and caselaw of the inter-American system recognize differences in the justiciability of civil and political and economic, social, and cultural rights. Cavallaro & Schaffer, *supra* note 2, at 223-24, 267-68. We imagine that Melish would phrase this last point of consensus somewhat differently, minimizing the extent to which dissonance from her theory still exists in the work of the inter-American system.

laration, the basis for much of Melish's critique simply collapses.

Apart from the illusory tensions and mischaracterizations of our thesis that pervade her piece,[16] relatively little of what Melish writes responds to our article.[17] Still, despite these broad areas of consensus, we disagree with Melish in several respects. We address each of these briefly in this Rejoinder.

First, it is clear that we disagree with Melish's current position[18] on the possibility of success in using article 26 to advance ESC rights. Our reading of the instruments of the system, as well as the Court's jurisprudence in this area, leads us to find relatively little hope in what we and Melish term the "direct" approach to litigating ESC rights before the Court. We also differ as to the possibility that states would react negatively to Court decisions extending the reach of article 26. We address Melish's critique of our position on article 26, recent Court jurisprudence in this area, and the likelihood of state resistance to the expansion of article 26 in Part IV.

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16. A good example of this is section VI(C). In that section, Melish argues that if one applies her four quadrant approach to ESC litigation, queue-jumping tensions *as between ESC and civil and political rights* are overcome. This argument purports to respond to our opposing view of queue-jumping. In fact, we do not argue in *Less as More* that ESC litigation involves specific queue-jumping but, rather, that all litigation (including international human rights litigation) involves some degree of queue-jumping. Melish's "response," on its own terms, appears to present a coherent challenge to an argument we do not make. However, when one realizes that we nowhere present the argument Melish imputes to us, this section—like many others—loses its purpose. *See* Melish, *Rethinking*, *supra* note 1, at 182 (mischaracterizing our conclusion about queue-jumping). Compare Melish's portrayal with our analysis of this issue. Cavallaro & Schaffer, *supra* note 2, 236-40, 281.

17. Much of the article promotes Melish's "four quadrant theory" of justiciability.

18. To be more clear, it is evident that the positions in our Hastings piece and in Melish's article in this edition are in conflict. *Compare* Cavallaro & Schaffer, *supra* note 2, at 267-69 *with* Melish, *Rethinking*, *supra* note 1, at 220-25. As we discuss in Part IV, *infra,* Melish's earlier writing suggests, at least, the belief that article 26 constitutes weak terrain for advancing ESC rights in the inter-American system. *See, e.g.*, TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS (2002) 346 [hereinafter MELISH, PROTECTING] (noting that "[t]he article 26 approach . . . remains quite uncertain").

Second, we differ as to the role of social movements and organized civil society in the litigation process. While Melish contends that she agrees with our position in this regard,[19] her analysis is framed strictly within the legal limits and technical logic of the inter-American judicial and quasi-judicial system. Melish attacks us for viewing litigation as part of a strategy designed to promote social justice or produce effects beyond the litigants.[20] By contrast, we argue that recognizing the limits of the system (particularly in numerical terms) renders any approach to litigation that does not seek to produce or at least encourage effects beyond the case at hand inefficient at best and misguided at worst. We also contend that listening to and working with social movements has real consequences for the framing of litigation and for the ways in which supranational bodies are best deployed. Quite simply, if a practitioner focuses on the goal of advancing social justice agendas rather than advancing the justiciability of ESC rights, her litigation strategies will differ. Of course, there may and ordinarily will be significant overlap between these agendas. But this is not always the case.

Third, in large part as a consequence of our distinct approaches to the role of social movements, we differ as to the strategic importance of focusing on cases that involve violations of the right to life. Melish critiques recent jurisprudential developments by the Inter-American Court that expand the scope of state obligations in the context of the right to life. By contrast, we embrace this development as the continuance

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19. Melish writes: "Indeed, that litigation—whatever its focus—should ideally always be accompanied by social movements, local-level follow-up, vigorous media advocacy, and national and international pressure campaigns is unquestionable." Melish, *Rethinking*, *supra* note 1, at 341. She further states:

> Based on these unassailable observations, [Cavallaro and Schaffer] conclude with the equally unassailable recommendation that supranational litigants should choose their cases carefully, work closely with local level organizations capable of generating popular support, and use a broad diversity of advocacy tools and media strategies to supplement their technical legal arguments. Few could disagree with this neutrally-framed thesis.

Id. at 185-86.

20. Melish writes, for example: "Nonetheless, in focusing their thesis and case-studies on the inter-American organs' *adjudicatory* functions, they misidentify the proper forum for generally 'promoting social justice' in the regional human rights system." *Id.* at 303-04.

of a positive trend that we identified in the Hastings piece, and one that we believe should orient social justice advocacy strategies that deploy the inter-American system. We address these issues in Part VI.

III. Blurring the Issues: The Justiciability of ESC Rights in Theory and in the Inter-American System

Responding to a position that we do not advocate, Melish details her approach to the justiciability of ESC and other human rights. Her fundamental premise is that we assume that ESC rights are not justiciable and that we accept traditional distinctions between the two classes of rights.[21] In fact, we challenge only the wisdom of *direct* litigation of ESC rights via article 26 before the Inter-American Court, terming it a "suspect option," that is, one unlikely to convince the Court and even less likely to be applied by states. As noted above, we do not question the access to the Commission for ESC violations provided by the American Declaration.[22]

Melish argues that there should be no distinction whatsoever, in terms of justiciability, between civil and political and ESC rights, as though this view is juxtaposed to our position. She sets out a four quadrant scheme that seeks to identify the aspects of ESC rights subject to judicial control and those suited only for monitoring. The quadrants consider, on one axis, individual vs. collective obligations, and on the other, obligations based on conduct vs. obligations based on result. Crossing the two axes, Melish divides obligations into four quadrants. Quadrant 1 involves individual-oriented, conduct-based duties; quadrant 2 concerns individual-oriented, result-based duties; quadrant 3 involves collective-oriented, conduct-based duties; and quadrant 4 concerns collective-oriented, result-based duties. Melish argues that only quadrant 1—indi-

21. *See, e.g., id.* at 177-78.

22. Ironically, several of the cases cited by Melish in her piece, including to demonstrate that ESC rights may be addressed in the petitions process through application of the American Declaration, are ones in which one or both of the authors have been involved as counsel. *See, e.g.*, José Pereira v. Brazil, Case 11.289, Inter-Am. C.H.R., Report No. 95/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003), *cited in* Melish, *Rethinking*, *supra* note 1, at 287 n.334 (in which petitioners alleged violations of ESC rights protected by the American Declaration).

vidual-oriented, conduct-based duties—are susceptible to judicial resolution. Quadrant 4 duties are appropriate, by contrast, for monitoring.

The differential treatment afforded to civil and political rights, as opposed to ESC rights, Melish argues, is due to a generalized failure of states, practitioners, and academics to appreciate the true nature of rights.[23] Her arguments have merit, insofar as they consider how the two classes of rights *might* or even *ought* to be treated. In fact, we do not question their relevance in future negotiations, such as those concerning the optional protocol on ESC rights.[24] But her theoretical approach is not directly responsive to our arguments, which are based on the instruments and jurisprudence of the inter-American system, their interpretation by the Inter-American Court,[25] and the institutional and resource limits that constrain the Court.[26] As Melish herself notes, "supervisory mech-

23. She writes, in this regard:

> Because these supervisory mechanisms have, in recent history, been associated with one category of rights or the other, the particular dimensions of state obligations assessed by the corresponding supervisory instances—as further developed and doctrinally refined by academics, advocates, and U.N. bodies—have been tethered conceptually to the *rights* supervised, rather than to the jurisdictional parameters of the supervisory instance itself.

Id. at 250 (emphasis in original).

24. Melish closes her piece by emphasizing the importance of an integrated view of civil and political and ESC rights, particularly in light of negotiations on treaties that may provide for direct oversight of ESC rights violations. *See id.* at 341-43. We agree that Melish's approach to ESC litigation and her critique of the traditional distinction between these two sets of rights are highly relevant to the debates concerning the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the new International Convention on the Rights of Persons with Disabilities.

25. In other sections of her article, Melish does challenge our understanding of the rulings of the Inter-American Commission and Court. *See, e.g.*, *id.* at 178-81. We discuss our differences in this regard below.

26. In an ideal world in which the inter-American system had vast resources and in which all the system's sentences were duly implemented as between the parties *and* for all similarly situated victims, more extensive litigation and more expansive jurisprudence on the scope of the system's ESC protections would be positive developments. Indeed, under these conditions, supporting Melish's innovative scheme for expanding the justiciability of ESC rights might make sense. *See id.* at 181-83. However, these ideal conditions do not exist, nor are they likely to develop in the foreseeable future. Based on the extremely limited nature of the system, then, we argue that the

anisms have . . . been associated with one category of rights or the other. . . [a distinction] further developed and doctrinally refined by academics, advocates, and U.N. bodies . . . ."[27]

It is worth noting, as we observe below, that our assessment of the direction of the Court's developing jurisprudence has been borne out by that body's decisions on ESC rights issues in the two years since we published the Hastings piece. As we discuss in this Rejoinder, the Court has refused to employ an expansive reading of article 26 that would enable it to find violations of ESC rights. It has also decided cases in line with areas of developing jurisprudence that we identified as promising in *Less as More*.[28]

IV. The Scope of Article 26, Hostile State Responses, and the Utility of the Direct Approach

A. *The Scope of Article 26*

In her 2002 guide to litigating ESC rights in the inter-American system Melish assessed the strength of article 26 claims in the following terms:

> While the "article 26 approach" is far more direct than the "integration approach," it is also far less tested. . . . Neither the Commission nor the Court has, moreover, ever *even suggested that article 26, in itself, articulates protected rights.* The article 26 approach therefore remains quite uncertain.[29]

Since then, the Court has been asked on several occasions to find violations of ESC rights through article 26.[30] Melish herself cites five separate opportunities in which the Court,

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Court is most effective when it allows highly visible issues to be addressed before an international adjudication body.

27. *Id.* at 250.

28. In particular, we address the Court's jurisprudence on the right to life in Part VI of this Rejoinder. *See infra* text accompanying notes 88-93.

29. Melish, Protecting, *supra* note 18, at 347 (emphasis added).

30. Melish correctly notes that the Commission has sought to apply article 26, citing several cases. Melish, *Rethinking*, *supra* note 1, at 209-10. We note this in our Hastings piece, though we question the wisdom of this line of jurisprudence and its likelihood to withstand scrutiny by the Court. Since the Hastings piece was published (and after the "obiter dictum" in *Five Pensioners*), the Commission has ceased to present claims to the Court under article 26. *Id.* at 268-70; *see also* Cavallaro & Schaffer, *supra* note 2.

when presented squarely with alleged violations of article 26 of the Convention, has failed or refused to find such violations.[31] While she seeks to minimize the import of these cases and to mischaracterize an important passage in the *Five Pensioners* case that flatly refuses to entertain the article 26 claims of petitioners and amici, Melish fails to convince the reader that her current understanding of ESC rights should be adopted by the Court. That her understanding constitutes the Court's actual vision is even further afield.[32]

In *Five Pensioners*, as Melish notes, the Commission, petitioners, and amici all specifically requested a determination regarding violation of article 26. Their combined arguments allege violations of this article with respect to the petitioners

31. *See* Melish, *Rethinking*, *supra* note 1, at 267 n.266.

32. Melish's misconstruction of the import of the Court's jurisprudence on article 26 affects her interpretation of the competence of the Commission as well, causing her to discount Commission determinations that reject her view as outliers. It is settled Commission practice that when violations are alleged of rights protected by both the Convention and the Declaration, the Commission will apply the Convention. However, the Commission may, and does, consider violations of the Convention and the Declaration when rights not protected by the Convention are violated. As the Commission wrote in *Menéndez, Caride et al. v. Argentina*, "[t]he rights to the preservation of health and to well-being (Article XI) and to social security in relation with the duty to work and contribute to social security (Articles XVI, XXXV and XXXVII) contained in the Declaration are not specifically protected by the Convention . . . . Thus the Commission will also examine the petitioners' allegations on violations of the Declaration." Menéndez, Caride et al. V. Argentina, Case No. 11.670, Inter-Am. C H.R., Report No. 03/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 42 (2001). Other cases have issued similar holdings. *See, e.g.*, Clotilde Perrone and Preckel v. Argentina, Case 11.738, Inter-Am. C.H.R., Report No. 67/98, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 31-33 (1999). While Melish cites these cases, she considers the exception permitting jurisdiction over the Convention and Declaration misdirected. *See* Melish, *Rethinking*, *supra* note 1, at 213. We suggest that Commission precedents in this regard are, at best, ambiguous, and support litigation of hybrid cases, that is, ones that allege violations of civil and political rights (under the Convention) and ESC rights (under the Declaration). *See, e.g.*, Cavallaro & Schaffer, *supra* note 2, at 271. Regarding the ambiguity of the jurisprudence of the Commission on article 26, see Naranjo Cárdenas et al. v. Venezuela, Petition 667/01, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. (2005) (reasoned vote of Clare K. Roberts, President, dissenting from finding of admissibility in accordance with holding in *Five Pensioners*), *available at* http://www.cidh.org.

themselves[33] as well as a breach of the state's obligation to realize the right to social security progressively over broader classes of Peruvians.[34] The Court responded to these arguments in the following terms:

> 147. Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, o[ver] the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.
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> 148. It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case.[35]

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33. In this regard, the Court observed, "[t]he Inter-American Commission and the representatives of the alleged victims and their next of kin alleged that Article 26 of the American Convention had been violated because, by reducing the amount of the pensions of the alleged victims, the State failed to comply with its obligation to progressively develop their economic, social and cultural rights and, in particular, did not ensure the progressive development of their right to a pension." Inter-Am. Court H.R., *Five Pensioners Case*, Judgment of February 28, 2003, Series C, No. 98, para. 146 [hereinafter *Five Pensioners*].

34. This latter tendency is, for instance, apparent in the brief presented by amici, which analyzes the general duty of non-regressivity and asserts that Peru violated article 26 by unjustifiably reducing social security benefits for all "individuals who have been adversely affected by the measure [that reduced the pensions]." Brief amicus curiae of the Centro de Estudios Legales y Sociales (CELS) and Professor Christian Courtis, Case No. 12.034, Benvenuto Torres, Carlos y Otros c. República de Perú, Inter-Am. Ct. H.R., at 17, *available at* http://www.cels.org.ar/Site_cels/documentos/amicus_benvenuto_peru.pdf. Authors' translation. Original text reads: *las personas a las que ha perjudicado la medida.*

35. *Five Pensioners* at ¶¶ 147-48.

Melish seeks in two ways to avoid the conclusion that this rejection of the "article 26 approach" undermines her argument. First, she mischaracterizes the role that this passage plays in the Court's opinion, and second, she misinterprets the passage's content in a self-contradictory attempt to reconcile it with her preferred view of how ESC litigation ought to proceed in the inter-American system. Neither attempt is persuasive.

Melish initially questions the importance of this section of the Court's decision by labeling it as obiter dictum.[36] However, given that the section is the basis of the Court's decision not to consider article 26 violations against either the named pensioners or any broader class, Melish's assessment is subject to serious doubt.

Further, one must consider the relevant context when analyzing the import of the language in Inter-American Court opinions. In Anglo-American law, the holding of a case is limited to those elements of a court's sentence necessary for resolving the dispute. Because all other language may be considered obiter dictum, courts in this tradition ordinarily refrain from commenting on matters beyond the issues essential to judgment. By contrast in the inter-American system—a hybrid of common and civil law—the Inter-American Court regularly provides crucial interpretation of the system's instruments well beyond what is necessary to resolve the litigation before the parties. This has been the practice of the Court since its first contentious case. In that matter, *Velásquez Rodríguez v. Honduras*,[37] two of the Court's most important determinations could theoretically be construed as unnecessary. The Court's analysis of exceptions to the rule of exhaustion of domestic remedies in that case, cited scores of times within the system and beyond, might be deemed largely unnecessary in light of the repeated use of specific domestic remedies made by the victim's heirs. More importantly, the Court could have omitted entirely the most important analysis and holding in *Velásquez Rodríguez*: its acceptance of the Commission's theory

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36. Obiter dictum has been defined as "[words of an opinion] entirely unnecessary for the decision of the case." Noel v. Olds, 138 F.2d 581, 586 (D.C. Cir. 1943).

37. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

of state responsibility for acts of third parties through proof of a pattern of forced disappearances and the inclusion of Manfredo Velásquez Rodríguez in that pattern. Indeed, it could have found the same violations based solely on its express finding that state agents *were* directly responsible for the disappearance of the victim.[38] At a minimum, then, the Court's observation regarding the viability of direct access via article 26 in *Five Pensioners* should place petitioners on notice that invoking this article to litigate ESC rights is a suspect option.

Perhaps aware that litigants familiar with inter-American jurisprudence are unlikely to accept her classification of this passage as mere obiter dictum, Melish seeks to save her argument by asserting that the *Five Pensioners* ruling is reconcilable with direct ESC litigation within the framework of her four quadrant theory. In this regard, she asserts in this journal that "the Court's dictum should be understood as rejecting only *one particular type* of article 26 claim: claims on which state responsibility for substantive rights infringement rests on alleged breach of quadrant 4, rather than quadrant 1, duties."[39] However, far from suggesting that there are two "types" of article 26 claims—one justiciable and the other not—the more natural reading of this passage supports the view that article 26 does not recognize individual, immediately-justiciable rights. As a consequence, the article 26 approach remains unpromising as a means of ESC litigation (precisely the view that we adopt in *Less as More*).[40]

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38. On this point, the Court wrote:

> The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under article 1 (1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

Id. at ¶ 182.

39. Melish, *Rethinking*, *supra* note 1, at 268 (emphasis in original).

40. An additional argument in support of our interpretation of article 26 involves the plain language of the text of the American Convention itself. That instrument establishes civil and political rights in articles 3 to 25. Each of those articles is drafted in express terms that establish the particular right with reference to the rights holder or in language that proscribes particular state behavior. These articles typically employ phrases such as "everyone has

Moreover, it is difficult to take seriously Melish's current position with respect to this passage, given that her past writings assert contradictory interpretations. Worth noting in this regard is Melish's evaluation of the possibility of employing article 26 as the basis for directly litigating ESC rights in an article she drafted shortly after the *Five Pensioners* decision. In that piece, while characterizing the relevant text as obiter dictum, Melish wrote, "the Court effectively obliterated article 26 as a repository for individually-protectable rights under the contentious jurisdiction of the inter-American human rights organs."[41] This candid assessment undermines the credibility of Melish's current challenge to our view that the Court has provided little basis for expecting direct access via article 26. Further reinforcing the implausibility of Melish's latest characterization of the *Five Pensioners* passage is another argument she made in an earlier version of the piece that now appears in this journal. There, Melish characterized the same *Five Pensioners* passage as "plainly-erroneous" and so detrimental to the article 26 approach that it must be "buried and forgotten" if future ESC litigation is to take place according to her preferred model.[42] Melish's constantly changing interpretation of the *Five Pensioners* language, rather than advancing her (current) thesis, instead undermines her credibility.

Equally revealing of the unsustainable nature of Melish's position is her novel interpretation of several subsequent cases in which the Court failed to find violations of article 26 alleged by litigants. Melish manages to construe these cases as support for her position—arguing that the Court's failure to cite *Five Pensioners* when refusing to recognize these claims establishes that the assessment of article 26 claims in *Five Pensioners* consti-

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the right" and "every person has the right" when describing the right from the perspective of the rights holder, and "no one shall be" when proscribing state conduct. Such language is conspicuously absent from the text of article 26, which provides only that states "undertake to adopt measures . . . with a view to achieving progressively" the realization of ESC rights for their populations. American Convention on Human Rights, art. 26, Nov. 22, 1969, 1144 U.N.T.S. 123.

41. Tara J. Melish, *A Pyrrhic Victory for Peru's Pensioners: Pensions, Property and the Prevention of Progressivity*, 1 JURÍDICA 51, 56-57 (2005).

42. Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, N.Y.U. Center for Human Rights and Global Justice Working Paper Series No. 2 (2006), at 50 (version available online May 2006-January 2007; on file with authors).

tutes mere obiter dictum.[43] The less strained and more convincing explanation would be that the judges in *Five Pensioners* believed that article 26 simply does not provide the basis for direct access to the Court, a belief that a majority of the justices apparently continue to hold.[44] It is also worth noting that the Commission appears to hold the same view, based on its choice *not* to allege violations of article 26 to the Court[45] after the decision in *Five Pensioners*.

Melish further critiques our analysis[46] of article 26 in light of article 19 of the San Salvador Protocol. Article 19 expressly limits access to the inter-American system's petitions process to articles 8(a) and 13 of the Protocol (which protect rights to labor association and education, respectively). We suggested that this article, in conjunction with the terms of the American Convention, leads to the conclusion that the American states drafting those two instruments did not intend to authorize the Court to adjudicate petitions alleging ESC rights abuse through article 26. Melish counters by arguing that the exis-

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43. She writes in this regard: "The Court's manifest discomfort with its article 26 dictum has led it not only to avoid extending or even referring to it again in any subsequent case but also, unfortunately—given the lack of a clear vision for resolving the quadrant 1/quadrant 4 difficulty—pronouncing on article 26 at all." Melish, *Rethinking*, *supra* note 1, at 267 n.266. The four subsequent cases cited by Melish in which the Court declined the opportunity to find a violation of article 26 are: Case of Children's Rehabilitation v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 255 (Sept. 2, 2004); Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay, Petition 12.313, Inter-Am. C.H.R., Report No. 2/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 11-12 (2003); Yean and Bosico Case v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sep. 8, 2005); Acevedo Jaramillo et al. v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 144, at 86 (Feb. 7, 2006).

44. We recognize, as the Court has, that article 26 may be relevant to interpreting other rights or in crafting remedies. *See, e.g.*, *Five Pensioners*, *supra* note 34, at 62. In this regard, other instruments, such as the American Declaration, that may not serve as the basis for a claim to the Court are also considered by this body in interpreting and applying those instruments which provide access.

45. In this regard, see Acevedo Jaramillo et al. v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 144, at 86 (Feb. 7, 2006). In that case concerning violation of among others, labor rights, "the Commission did not allege that article 26 of the Convention had been violated." Authors' translation. Original text reads: *la Comisión no alegó que se hubiera violado el artículo 26 de la Convención.*

46. Melish also devotes attention to the *travaux préparatoires*, challenging the research of Matthew Craven in this regard, which is cited in our Hastings piece. *See* Melish, *Rethinking*, *supra* note 1, at 225-27.

tence of two other treaties in the inter-American system that specify rights beyond the terms of the American Convention, and which do not grant access to the petitions process for some of those rights, proves that our analysis is misguided.[47]

What Melish fails to consider, however, is the relevant context in which each treaty was drafted and approved. To begin, we emphasize that the San Salvador Protocol, unlike the treaties cited by Melish, is a protocol to the American Convention on Human Rights and thus maintains a special relationship with it.[48] The full name of the instrument is the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. In this context, Melish's citation of other treaties in the inter-American system is not relevant to a discussion of the interpretation of the American Convention in conjunction with its additional protocol. Further, in the case of the San Salvador Protocol, the background understanding of the drafters regarding ESC rights and the American Convention was that those rights could not be litigated through article 26 of the Convention. This background understanding was based on the fact that article 26 had never been employed successfully to defend ESC rights through the petitions process. Based on this understanding, the decision by the states drafting the San Salvador Protocol to grant access to the petitions process (potentially leading to the Inter-American Court) for violations of articles 8(a) and 13 should be read to reflect the understanding by American states at the time in two respects: First, the American Convention, through article 26, at least at the time, did not provide direct access to the Commission and Court and, second, states ratifying the San Salvador Protocol could be made to answer to individual petitions only for violations of articles 8(a) and 13. Other, strained interpretations are possible, but less convincing.

47. *See id.* at 213-15.

48. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, November 17, 1988, O.A.S.T.S No. 69.

B. *Possible Hostile State Responses to the Direct Application of Article 26*

Throughout her piece, Melish questions our concern that a Court decision applying article 26 directly might meet with state resistance. To frame her critique, Melish posits a theory of state resistance apparently drawn from democratic theory and the role of courts in domestic contexts.[49] Her focus on the proper role of courts, however, is largely inappropriate to the analysis of the conditions that lead states to react negatively to measures taken by supranational bodies. Melish suggests that courts risk undermining their legitimacy by overstepping their appropriate role.[50] But legitimacy, in the terms that Melish proposes, cannot explain the case studies on hostile responses that we included in *Less as More*. For example, the Court's reasoning regarding the application of the death penalty in Trinidad and Tobago is firmly grounded in law and did not overstep the Court's legitimate judicial function. Yet Trinidad and Tobago's response to that holding was decidedly hostile: It led to that country's withdrawal from the inter-American system.[51]

Legal scholar Lawrence Helfer's work is relevant in this context. In a 2002 article investigating the phenomenon of Caribbean rejection of supranational efforts to restrict application of the death penalty, Helfer explains the phenomenon of hostile state reaction to supranational decisions in terms of overlegalization. While one variant of overlegalization involves expansion of the initial terms of a treaty (by expansion of a supranational body's jurisdiction, for example), another variant "occurs where opportunities to detect, expose, or remedy noncompliance increase over time, forcing states closer to the commitments formally enshrined in a treaty's text."[52] Helfer

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49. *See*, Melish, *Rethinking*, *supra* note 1, at 287-92.

50. *See id.* at 290-92.

51. *See* Cavallaro & Schaffer, *supra* note 2, at 249-50. **R**

52. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1856 (2002). In this regard, the authors recognize a debt to Prof. Helfer for his contribution to the debate through development of the concept and operation of overlegalization. This term, rather than "legitimacy" better explains the phenomenon that we sought to address in the *Hastings* article and which Melish purports to attack. The concept of overlegalization also serves to avoid confusion created by Melish's

argues that this form of overlegalization may be prevalent in states outside of Europe in which treaty compliance is limited. Overlegalization, Helfer argues, may lead states to reject supranational engagement. On this theory of overlegalization, a Court interpretation of the scope of article 26 that would permit direct access for ESC violations could constitute either broadening of the jurisdiction, or expansion of the "opportunities to detect, expose or remedy noncompliance"—in either case, results likely to produce hostile state reaction. Again, in both cases, a given state's hostility would flow primarily from its belief that the supranational body is engaging in more or a different kind of oversight than the state initially accepted. In this model, state perception is more important than the correctness (to the extent that this may be judged objectively) of the supranational decision. If, as we argue, states understand the terms of the American Convention and the Court's rulings in *Five Pensioners* and subsequent cases as limits on direct access for ESC litigation via article 26, a broader interpretation of that article by the Court would constitute overlegalization, as Helfer explains the phenomenon.

Melish's critique further fails to appreciate the very delicate balance that exists in the inter-American system. State pressure to reduce the reach and resources of the Commission and Court constitute a permanent element of the context in which cases are litigated and decided.[53] In addition to renouncing acceptance of the Court's jurisdiction or withdrawing ratification of the American Convention, a state may also publicly refuse to implement a Court sentence or simply fail to apply its orders. Recognizing these factors, along with the system's highly limited resources and capacity to resolve cases,[54] is essential to any realistic approach to litigation in the system. Such an approach must seek to work within the established limits of the system (or to move them, incrementally) and to engage a range of social forces to avoid placing a controversial Court sentence at the center of the advocacy strategy.[55]

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inappropriate application of domestic institutional political legitimacy theory to state responses to supranational decisions.

53. *See* Cavallaro & Schaffer, *supra* note 2, at 220 n.2. **R**

54. We discuss this at some length in the Hastings piece. *See id., passim.*

55. We suggest that in those instances in which state opposition to Court sentences has been high for the reasons outlined above, states have been able to focus on decisions of the Court as the centerpiece of conflict. That

Melish is correct that state rejection of Court sentences is not specific to litigation of ESC rights; indeed our case studies demonstrate this. She attacks us, however, for failing to provide direct evidence to support our contention.[56] Our contention, though, is that a Court sentence based exclusively on article 26 would likely provoke a strong, negative reaction from the relevant state. Because there have been no Court sentences applying article 26 directly, we cannot cite state reactions to such sentences; instead, we analogize based on state response to Court determinations on civil and political rights, as well as state perception of the legitimacy of supranational oversight of ESC rights as manifested elsewhere.[57]

Seeking to support her critique of our argument that application of article 26 to grant access to the Court for ESC claims might provoke negative state response, Melish dedicates several pages to demonstrating that domestic courts and legislatures in the Americas have embraced ESC rights. Yet the extent of domestic constitutional acceptance of human rights, including ESC rights *by and within* Latin American domestic legal

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is, by focusing on a relatively isolated Court decision, states were able to frame the conflict (whether to apply the death penalty in Trinidad and Tobago; whether to accept supranational control of the battle against terrorism in Peru) in terms of national sovereignty vs. supranational intervention in domestic affairs. State efforts to delegitimate the determinations of the inter-American system are more likely to succeed when those decisions lack sufficient grounding or involve extreme interpretations of the system's instruments. The combination of isolated supranational litigation efforts together with relatively weak legal support is what most concerned us in *Less as More* and continues to concern us now.

56. From here, Melish proceeds to devote several pages to summarizing *domestic* decisions on ESC rights in the Americas, a matter not relevant to our position. *See* Melish, *Rethinking*, *supra* note 1, at 280-83.

57. Melish argues that state response to reference to ESC rights in friendly settlements and precautionary measures ordered by the Commission and, in a few instances, in provisional measures by the Court, undermines our concerns about possible hostile responses to a Court ruling on ESC rights through article 26. *See id.* at 283-87. These instances are simply not relevant. First, we do not question the Commission's authority to address ESC issues by applying the Declaration. And voluntary acceptance of friendly settlements tells us little about state reaction to Court judgments that go beyond the bounds of their jurisdictional scope. Second, and more importantly, precautionary measures and provisional measures, unlike sentences in contentious cases, do not involve final determinations of state responsibility for rights abuse, and instead seek to protect persons at risk through state cooperation.

structures, is a point that we not only do not challenge, but affirmatively recognize in our Hastings piece.[58] The question we raise concerns potential state response to supranational decisions that go beyond the text of the instruments establishing jurisdiction. That Latin American states accept domestic judicial oversight of ESC rights does not speak to their potential resistance to supranational exercise of jurisdiction over these issues without clear, conventional basis. If, as we argue, states understand the treaties and jurisprudence of the Inter-American Court as precluding direct article 26 access to adjudicate ESC rights, then they are likely to react much as they would were the Court to overstep its competence in another area, as for instance in an exercise of jurisdiction over a state that had not yet ratified the American Convention.

C. *The Utility—or Lack Thereof—of the Article 26 Approach*

Melish herself has recognized that the direct approach is largely unnecessary to achieve practical gains. In her guide to litigating ESC rights in the inter-American system, Melish compared the "article 26 approach" with the "integration approach," the latter referring to framing the same situations of abuse in terms of violations of the civil and political rights protected in articles 3 to 25 of the American Convention:

> As a practical matter, virtually identical results can generally be achieved using the "article 26 approach" and the "integration approach." . . . [A]ll of the "rights implicit in the OAS Charter" can, in most cases, be protected through articles 3-25 (using the integration approach). A violation of the right to health, for example, might be alleged just as easily under Convention article 5 (personal integrity) as it could be under Convention article 26 ("the rights implicit in the OAS Charter"). The two approaches are thus, in many ways, substitutes for one another.[59]

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58. *See* Cavallaro & Schaffer, *supra* note 2, at 223 n.9, 233 n.48. **R**

59. *See* MELISH, PROTECTING, *supra* note 18, at 346. In her piece in this edition, Melish reiterates this principle, noting, "many of the norms included in Chapter II—formally entitled 'Civil and Political Rights'—also expressly protect rights appropriately understood as economic, social, or cultural . . . [such as] inviolability of the home, freedom from compulsory la-

This "integration approach" squares with what we term an elements approach, that is, one that seeks to vindicate ESC elements inherent in civil and political rights through broad interpretations of the latter set of rights. Melish thus acknowledges that such an elements approach will achieve "virtually identical results" as the article 26 approach in ESC litigation. Why, then, insist on article 26? Melish's current preference for framing violations in terms of article 26 appears to flow from a focus on promoting the jurisprudential development of ESC rights themselves, rather than advancing social justice by achieving concrete results in ESC-related cases.[60] While advancing supranational justiciability of ESC rights may be valuable at some level, to the extent that it conflicts with advancing the work of social movements and promoting social justice, we contend—as we did in *Less as More*—that the latter concerns must be given priority. Melish purports to accept our argument that litigators must work closely with social movements and seek to advance the agendas of these groups, but, as we explain further below, her suggested approach favors detached jurisprudential advances at the expense of social justice.

V. Listening to Social Movements and Civil Society

Much of Melish's misunderstanding of our argument stems from her failure to appreciate our conception of the role of social movements, civil society, and media advocacy in developing campaigns to foster social justice. Melish purports to accept the importance of working with social movements and civil society to advance this goal.[61] As she writes:

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bor, freedom of labor association, and the right to property." Melish, *Rethinking*, *supra* note 1, at 221.

60. Of course, to the extent that promotion of ESC rights itself advances social justice, this might constitute a separate justification for such framing. Where there is tension, however, we favor social justice over jurisprudential expansion. *See id.* at 181-82.

61. Her acceptance of this position is tempered in other parts of her piece. Thus, she asserts that we "misidentify the proper forum for generally 'promoting social justice' in the regional human rights system . . . [because] the Commission and Court may not legitimately assume that broad undertaking through their adjudicatory competence." *Id.* at 304. Here, Melish makes two mistakes. First, she discourages practitioners from employing the contentious jurisdiction of the Commission and Court to promote social justice, perhaps the most serious error in Melish's argument for her four quad-

> Cavallaro and Schaffer's . . . insistence on the imperative of a more concerted focus on practical on-the-ground enforcement and implementation of supranational decisions is firmly supported. Indeed, that litigation—whatever its focus—should ideally always be accompanied by social movements, local-level follow-up, vigorous media advocacy, and national and international pressure campaigns is unquestionable.[62]

We do not contend that litigation ought to be merely accompanied by social movements, media advocacy, and other forms of domestic and international pressure.[63] This phrasing, and Melish's implicit understanding of "accompan[y]" suggests that litigation should drive the advocacy strategy and that other elements should support it. We argue that the reverse is true. That is, broader advocacy campaigns may include litigation in the inter-American system, as appropriate, but supranational litigation preferences should not impose limits on advocacy for social justice. Social justice advocacy strategies, however, may lead to restrictions or modifications of methods of litigation.

Melish thus fails to grasp fully that the relationship between litigation and other strategies will have real conse-

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rant theory. Second, she misunderstands our arguments. We do not urge the Commission and Court to issue sweeping verdicts on the promotion of social justice. Rather, we urge them to resolve cases in accordance with their caselaw. We do, however, urge practitioners to think creatively about the system and ways to employ it jointly with other forms of activism and media pressure to advance social justice. That is, we call on petitioners to work with social movements to frame cases in ways that raise vital social issues. By so doing, petitioners may leverage litigation before the system (not just final determinations, but the ongoing litigation itself) to increase awareness and provide a moral compass for broader campaigns.

62. *Id.* at 341.

63. We meant our use of the term "accompany" in the Hastings piece to refer to integrated strategies in which supranational litigation plays a role, as opposed to strategies that privilege litigation and engage other methods of advocacy as secondary, "accompanying" elements. In *Less as More*, for example, we wrote, "[e]xperience demonstrates that international litigation not accompanied by parallel, coordinated campaigns by social movements and/or the media is unlikely to produce effective results. In light of this, we underscore the need for supranational litigators to avoid taking the lead on strategic decision-making regarding the use of the Inter-American system." Cavallaro & Schaffer, *supra* note 2, at 275. **R**

quences for the nature of petitions submitted to the system as well as the way they are framed and litigated. In practice, social movements are often more interested in the Court as an avenue for raising the profile of particular agendas rather than as a forum in which the justiciability of ESC rights may be advanced. Moreover, in light of the extremely limited access to the Court in numerical terms, these two objectives often come into conflict. As we stressed in our Hastings piece, the Commission and Court adjudicate a handful of cases per year. The Court, for example, has failed to address even an average of one case per country per year since its inception. Since 1979, eighty-seven contentious cases have been presented to the Court, leading to 162 determinations; the Court has resolved an additional seventy-two requests for precautionary measures, and has issued nineteen advisory opinions.[64] Taken over the twenty-seven years of its existence, this yields an average of just over three contentious cases per year. Even if one begins the count in 1986, the year the first contentious cases were forwarded to the Court, one finds an average of just four such cases per year. While these numbers have increased in recent years, particularly after the reforms of 2001, the likelihood that a case will be brought to the Court in a given year against any particular country are less than fifty percent. Based on these severe limits, we argue that petitioners must rethink their understanding of the system. With such remarkable limits on its access, the system cannot reasonably be viewed as capable of responding to every injustice in the Americas.[65] Instead, it should be seen as a tool that must be used sparingly to magnify a very, very limited universe of cases. Which universe of cases, we argue, is the fundamental question. If framed intelligently, litigation before the system may provide opportunities for thoughtful practitioners to promote social justice more broadly. The hypothetical cases in the Hastings piece seek to identify areas in which litigation may serve to raise the profile

64. Inter-Am. Ct. H.R, *Jurisprudencia*, *available at* http://www.corteidh.or.cr/ (last visited Jan. 28, 2007).

65. We cannot underscore this point enough. Our analysis of litigation strategies is entirely contextual. If the inter-American system were expanded and were provided with greater resources and state support, we would support expansion of litigation of all types. However, given that very, very few cases are able to proceed to the Court, we argue for greater care in selecting cases to be petitioned.

of vital areas of social injustice in Latin America. The bottom line is very often one that involves real tradeoffs. Should the one case in any given year that the Court addresses from Ecuador focus on extending the justiciability of protections against forced eviction or on the killing of an indigenous leader seeking control of resources on traditional lands? Should the one case likely to proceed to the Court against Brazil in a given year address the concerns of persons with mental health issues, through the prism of a patient beaten to death in a closed mental hospital, or on efforts to encourage the Court to recognize an article 26 claim to ESC rights? Admittedly, these questions are not presented in absolute terms to any individual petitioner, but they flow directly from the extremely limited capacity of the system and, in particular, the Court.

If, as we argue, the main objective of supranational litigants in the inter-American system should be to place issues before supranational bodies in conjunction with other advocacy strategies, then it should not matter whether the Commission or Court addresses a particular question from the framework of civil and political or ESC rights. More important, we contend, is which issues are addressed and what broader efforts are included in the advocacy campaign. If the civil and political rights frame offers greater opportunity for advocacy and promotion of change, then this frame, rather than the ESC frame, should be given priority.[66]

It is precisely our focus on the real world impact of cases, jointly with our observations about the instruments and jurisprudence of the system (rather than idealized theories about how ESC rights *ought* to be litigated), that led us to identify areas in which deploying the inter-American system could advance social justice in the Americas. The hypothetical cases that we present, therefore, seek to demonstrate areas in which social justice movements might promote their agendas through litigation; each hypothetical case identifies a possible

66. However, if the objective of accessing the system is to promote the justiciability of ESC rights—as it appears Melish believes—then one's preferred litigation strategies will necessarily be different. That is, one will seek to ensure that particular types of claims involving particular rights progress through the system, with less regard for whether these cases are likely to produce impact on the ground. *See* Melish, *Rethinking*, *supra* note 1, at 181-82.

point of entry for practitioners to engage the inter-American system.

Note that these thumbnail sketches, from which petitioners might seek to develop test cases, are presented in precisely this fashion—as situations of social injustice within which a case might be framed to promote and provoke societal responses. Each hypothetical case takes up less than a single page of text in the Hastings piece and none purports to establish all the elements necessary for a case to be admitted and processed by the inter-American system. Before filing a petition before the Commission, a petitioner would, of course, have to ensure compliance with the system's requirements for filing cases.[67] In this regard, Melish dedicates a great deal of space to finding gaps in the hypotheticals' fulfillment of certain admissibility or justiciability requirements. However, her critiques are unwarranted given that the hypothetical cases do not purport to present complete petitions, ready for litigation. Rather, the hypotheticals represent areas of profound social injustice that might be cognizable and reviewable by the inter-American human rights system if framed in accordance with the rules and procedures of the system.

A. *Corumbiara and Eldorado dos Carajás: Working with Social Movements*

Melish's analysis of the Corumbiara case demonstrates her failure to understand fully that advocacy strategies do not begin and end with litigation before the inter-American system, as well as her failure to see that advocacy strategies that do not place the system at their center often demonstrate greater promise to promote social justice.

Melish chastises the litigants and the Commission for focusing in Corumbiara on the killings and instances of torture. From her vantage point, Melish sees a missed opportunity, one

67. Here, we thank Melish for raising the ambiguity in some of the hypothetical cases. To the extent the language of those cases suggests that a broad, poorly defined claim would be admissible merely by invoking a civil or political right, let us correct that misunderstanding now. Further, when we refer to the potentially revolutionary impact that a Court determination might have, we seek to refer to the impact that a determination in a specific case, litigated within the constraints of the system, would have in conjunction with broad advocacy jointly with social movements, civil society, and the media. *Id.* at 181.

in which her vision of ESC litigation might have been advanced. In Brazil at the time, the vision of those working with landless and human rights leaders was quite different.[68] The extreme violence employed by the police, particularly after seizing control of the Santa Elina ranch, was an issue that helped to catapult and maintain the land reform debate—in its many dimensions—to national prominence.

The choice to emphasize conflicts involving extreme violence was important for the broader land reform strategy. A similar strategic decision was made the following year when police attacked a group of landless squatters pressing for expropriation in Pará state. In that incident, the squatters were occupying the main road connecting the south of Pará state with the capital, Belém, when military police opened fire on them and attacked the squatters with hoes and machetes, killing nineteen and wounding scores of others.[69]

In both cases, the advocacy agenda focused on highlighting the violations of the right to life in an effort to mobilize domestic and international public opinion against the use of police violence to resolve land conflicts. This, rather than a pronouncement by the inter-American system on forced evictions, was the main goal of the litigation strategy. The landless movement, most probably Latin America's best developed social movement, deployed a range of strategies designed to end forced evictions and to bring about change in land tenure patterns. These included pressure for legislative change, litigation within Brazil, and, primarily, land occupations. Because the last element was so central to its overall strategy, reducing the threat of future massacres by police was vital to the landless movement and far more important than the development of supranational doctrine unlikely to produce significant effects within Brazil.

Melish incorrectly assumes that because the case before the Inter-American Commission did not focus on litigating ESC rights that these issues were not part of the broader advo-

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68. James L. Cavallaro, at the time, director of CEJIL/BRASIL and Brazil office director of Human Rights Watch, was one of several petitioners in both the Corumbiara case and in the Eldorado dos Carajás matter.

69. Admissibility El Dorado Dos Carajás, Petition no. 11.820, Inter-Am. C.H.R., Report No. 4/03, *available at* http://www.cidh.org/annualrep/2003eng/Brasil.11820.htm.

cacy campaign. For one, the submissions to the Commission focused on the context of gross inequality in which the killings occurred. During the time period framed by the initial Corumbiara case (October 1995), the Eldorado dos Carajás massacre (April 1996), the filing in that matter, and the litigation of the two cases (over the next several years), those engaged in promoting land reform routinely addressed the underlying ESC claims in a range of fora (including in domestic courts, the Brazilian parliament, and international debates). Melish chastises the petitioners in the Corumbiara case for not expanding their claims to include forced eviction. But those involved in the advocacy campaign *did* address the broader issues of forced eviction, as well as questions related to land distribution, financing, and credit for land reform, even beyond the scope of what could have been presented to the Inter-American Commission.[70] Media sources as well, in their coverage of the Corumbiara matter, routinely analyzed the broader context of land reform, squatter occupations, the demand for land settlement, and respect for housing rights.[71]

Interestingly, the record demonstrates the partial success of this strategy. While land conflicts still continue to dominate rural Brazil, incidents of multiple deaths caused by police firing at squatters virtually ceased after the Corumbiara and Eldorado massacres. After the killings of twenty-eight people in the Corumbiara and Eldorado incidents in a period of just eight months, the number of people killed by police in rural land conflicts decreased dramatically—likely in response to this mobilization and joint strategy. Over the next four years, police killed a total of eight civilians in this context. All but one of the conflicts involved a single victim; the bloodiest caused two[72] fatalities.[73] One of Brazil's leading weekly

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70. Mario Osava, *Brazil: Fear of Social Unrest Revives Land Reform*, IPS – INTER PRESS SERVICE, Sept. 28, 1995; *see Corumbiara: Deadly Eviction*, TIME, Aug. 28, 1995, at 8; *Land Question Develops into Crisis: Military Fear Conflicts May Lead to Guerrilla Violence*, 1995 LATIN AMERICAN WKLY. REP. 447-48.

71. Mario Osava, *Brazil*, *supra* note 7; *Corumbiara: Deadly Eviction*, *supra* note 70; *Eleven Die in Land Conflict: Lula Claims Cardoso Has No Interest in Agrarian Reform*, 1995 LATIN AMERICAN WKLY. REP. 374-75; Diana Jean Schemo, *Brazilian Squatters Fall in Deadly Police Raid*, N.Y. TIMES, Sept. 19, 1995, at A1.

72. It is possible to interpret this figure as three. According to CPT data, military police and gunmen killed two civilians on March 2, 2001 in the municipality of Confresa, state of Mato Grosso. Two days later, they killed an-

magazines, *IstoÉ,* reported months after the Eldorado massacre that the State Government in Pará—the epicenter of Brazil's most violent rural clashes—expressly ordered its military police to avoid all situations that might lead to violent conflict similar to that in the Eldorado massacre.[74]

At the same time, while multiple killings by police in rural conflicts practically ceased, land occupations intensified, leading to the settlement of hundreds of thousands of squatters.[75] According to official data, in relation to the preceding twenty-five years, between 1995 and 1999 the average number of families settled per year increased by all accounts. By some, the surge was as much as five hundred percent.[76] According to

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other civilian in the same municipality. It is unclear whether these should be considered two separate conflicts. *See* COMISSÃO PASTORAL DA TERRA, CONFLITOS NO CAMPO: BRASIL '97 10-11 (1998). After 2001, CPT stopped including information on the identity of murder suspects.

73. Nevertheless, despite the reduction in the numbers of landless squatters and protesters killed by police after Corumbiara and Eldorado dos Carajás, rights groups in Brazil have documented an increase in other forms of repression. For instance, according to Landless Movement (MST) data, instances of arrests of landless peasants vastly increased in the years after 1996, suggesting a displacement in repressive techniques and highlighting the continued need for advocacy related to civil and political rights that would allow the landless movement to continue its land reform push. *See* Movimento dos Trabalhadores Rurais Sem Terra, *Prisões – 1989 a 2003*, *available at* http://www.mst.org.br/mst/pagina.php?cd=1501.

74. According to *IstoÉ,* "[t]he Government of Pará, after the massacre of Eldorado dos Carajás, ordered the Military Police not to involve itself in any situation that might result in confrontation." The original in Portuguese reads: *O governo do Pará, após o massacre de Eldorado do[s] Carajás, determinou ao comando da Polícia Militar paraense que não se envolva em nenhuma situação que possa resultar em confronto. See* Mário Chimanovitch, *Tensão permanente: Relatórios reservados informam que os sem-terra pretendem crier versão nacional de Chipas no Par*á, ISTOÈ, Aug. 7, 1996, http://www.zaz.com.br/istoe/politica/140112.htm [hereinafter *Tensão permanente*].

75. According to the MST data, from 1990 until 1995, the number of land occupations [*acampamentos*] fluctuated from a low of seventy-eight in 1991, with 9203 families, to a high of 214 in 1993, with 40,109 families. Then, from a low, in 1995, of 101 land occupations representing 31,619 families, the number of occupations grew each year to 538 with 69,804 families in 1999. [*A participação da polícia em assassinatos e chacinas não é novidade, mas ela vem crescendo nos últimos anos.*] COMISSÃO PASTORAL DA TERRA, CONFLITOS NO CAMPO: BRASIL 95 5 (1996).

76. According to the government, an average of 11,870 families were settled per year from 1970 through 1984. That figure increased modestly to 15,013 over the next ten years. From 1995 through 1999, the average num-

the Landless Movement, the number of land occupations more than doubled from 1995 to 1999, compared to the previous five years.[77] Official figures demonstrate that more families were settled from 1995 through 1999 than in the twenty-five years preceding that period.[78] As for land expropriation (*desapropriação*)—areas ordered redistributed for land reform purposes—more than double the number of hectares were expropriated in the 1995 through 1999 period than in either of the two previous five year periods.[79]

Notably, among the areas expropriated by the federal government was the Macaxeira *fazenda*, the focus of the highway occupation and brutal police response that resulted in the killing of nineteen squatters in the Eldorado case.[80] In addition, in response to the domestic and international outrage over the Corumbiara and Eldorado massacres, federal authorities implemented a range of other measures, including expediting expropriations for land reform and providing additional funding for landless settlements.

Rather than supporting Melish's thesis, the Corumbiara and Eldorado cases underscore the importance of understand-

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ber of families settled each year, according to government reports, surged to 74,644. *See* Instituto Nacional de Colonização e Reforma Agrária, *Relatório de Atividades INCRA 30 Anos*, *available at* http://incra.gov.br/arquivos/0173400476.pdf [hereinafter *Relatório de Atividades*]. Different INCRA reports provide somewhat contradictory figures, though all affirm the stated trend of increasing settlements from 1995 through 1999, in varying degrees. Another INCRA report released some time after the thirty-year retrospective, asserts that only 218,000 families were settled from 1964—the year of the passage of the Land Statute [Estatuto da Terra]—until 1995. Then, from 1995 through 1999, 372,866 families were reported settled. *See* Instituto Nacional de Colonização e Reforma Agrária, *O Futuro Nasce da Terra*, *available at* http://www.incra.gov.br/arquivos/0173500477.pdf [hereinafter *O Futuro Nasce da Terra*].

77. Movimento dos Trabalhadores Rurais Sem Terra, *Acampamentos – Total dos Acampamentos, 1990-2001*, *available at* http://www.mst.org.br/mst/pagina.php?cd=897.

78. In its thirty year retrospective, the Instituto Nacional de Colonização e Reforma Agrária (INCRA) reported that while 316,327 families were settled from 1970 until 1995, in the five years that followed, a total of 373,220 families were settled. *See Relatório de Atividades*, *supra* note 75.

79. According to the government, 4,191,147 hectares were expropriated from 1985 through 1989, falling to 3,858,828 hectares from 1990 through 1994 before jumping to 8,785,114 hectares from 1995 through 1999. *See O Futuro Nasce da Terra*, *supra* note 75.

80. *See Tensão permanente*, *supra* note 73.

ing that social movements, not lawyers, should take the lead in designing social change strategies. Lawyers, of course, must understand and apply legal rules. But they should do this in a way that supports the objectives of those directly affected by grave social injustice, rather than in ways that promote their particular jurisprudential agendas.[81] The Corumbiara case is one example among many in which the need for litigants to work more closely with social movements shapes the legal strategies adopted.[82]

Melish's analysis of the *Yean and Bosico* case warrants similar scrutiny. There, Melish criticizes the Court, questioning its decision to focus on the nationality of the children involved, rather than on the right to education (an issue that might have been addressed, she argues, had the Court accepted petitioners' article 26 arguments). Melish suggests that this focus is responsible for the backlash against the decision in the Dominican Republic.

Just as likely, though, is that the governmental response to the Court decision is based on the centrality of the Court litigation in the advocacy campaign, as well as the relative lack of force of the social movements, civil society, and media supporting the issue at the center of the litigation.[83] We argue that supranational litigation in controversial areas that is not

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81. The potential benefits of an advantageous ruling on the right to be free from forced evictions in the Corumbiara case must also be weighed against the possibility of an adverse judgment and the negative precedent it would create. Given the limited experience of the Inter-American Commission with forced eviction up to 1995, these considerations should weigh more prominently in Melish's analysis.

82. In this section, as in her discussion of the application of ESC rights by domestic courts in Latin America, Melish conflates supranational and domestic litigation, two very different creatures. The holdings and implementation of the *Grootboom* decision, while interesting from a jurisprudential perspective, are not particularly relevant to the discussion of the most effective role for supranational litigation for particular national contexts. In Brazil, at the time of the Corumbiara filing, a range of efforts were being taken nationally to promote land reform and minimize forced evictions, in concert with the international focus on the most egregious forms of state violence in the context of the struggle for land. *See* Melish, *Rethinking*, *supra* note 1, at 315-19.

83. The opinion in *Yean and Bosico* notes testimony regarding the unpopularity of the issue of equal rights for Dominicans of Haitian descent. Yean and Bosico Case v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 85-86 (Sep. 8, 2005).

well supported in the domestic agenda is unlikely to produce social change and may produce a backlash against international litigation. While full examination of this issue is beyond the scope of this article,[84] this explanation is at least as plausible as the analysis promoted by Melish.

A case decided in 2006 by the Inter-American Court in which both authors served as counsel reaffirms many of the points we argued in *Less as More* and which Melish attacks in this journal. The case, *Ximenes Lopes v. Brazil*,[85] concerned a killing within a psychiatric clinic operating pursuant to a contract with authorities in Brazil. While the case was framed in terms of civil and political rights, it provided an important vehicle for addressing the situation of persons with mental health disabilities, particularly those in closed institutions in Brazil. The discussion fostered by the supranational litigation occurred not only in the broader debate within Brazil, but also within the terms of the litigation itself.

After finding that the death of the victim, Damião Ximenes Lopes, was attributable to the state, the Inter-American Commission recommended that Brazil take necessary measures to avoid the recurrence of such violations in the future. The death had occurred in a closed mental institution. While Brazil could have limited its arguments regarding measures to prevent recurrence to those that would ensure investigation and prosecution of incidents of abuse within psychiatric centers, it instead also entered evidence regarding steps it had taken to reduce the frequency of confinement of persons with mental health problems and to restructure its national mental health program.[86] In so doing, representatives of the Brazilian state sought to demonstrate to the Court their efforts to com-

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84. In addition, we observe that while our experience and direct involvement in the Brazilian litigation and advocacy strategy qualify us to analyze the role and impact of the inter-American system there, our analysis of the *Yean and Bosico* case is based instead on review of media reports and discussions with some of those close to the litigation.

85. Ximenes Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149 (Jul. 4, 2006).

86. One of the witnesses presented by Brazil was Pedro Gabriel Godinho Delgado, National Coordinator of the Mental Health Program of the Ministry of Health. Godinho Delgado's testimony focused on measures taken by the state to increase outpatient care, as opposed to confinement, as well as measures designed to promote and respect human rights within the mental health system. *See id.* at ¶ 47.3.b.

ply with the spirit of the Commission's recommendations. This, in turn, fostered broad debate in the litigation, and more widely within Brazil, about national public health policy. This also led the Court to address other mental health issues, including "the special attention due to persons who suffer mental health disabilities as a result of their particular vulnerability."[87] In sum, the *Ximenes* case demonstrates, among other things, how an issue framed legally in terms of civil and political rights may serve to address questions of social justice that might also be framed in ESC terms.

VI. JURISPRUDENCE AND INTEGRATED ADVOCACY MEET: THE COURT'S DEVELOPING JURISPRUDENCE ON THE RIGHT TO LIFE

Recent expansion of Court jurisprudence on the right to life is consistent with the approach that we outlined in *Less as More*, rendering our suggestions there even more relevant. Melish, however, questions our reliance on the right to life in our hypothetical cases, asserting that this focus serves to exclude other victims and their ESC rights claims.[88] One of the key points that we drive home in our initial piece is that litigation in the inter-American system, by its inherent, limited nature, excludes the overwhelming majority of victims of rights abuse in the Americas and will continue to do so until and only if the system is radically overhauled.[89] Until such time, cases should be chosen carefully and, we argue, jointly with social movements and organized civil society. When this is done, violations of the right to life—in whatever context—are likely to be given priority. There are at least two important reasons to maintain this focus. The first concerns the development of the Court's jurisprudence in this regard; the second involves the practical advocacy value of a petition involving violations of this right.

Over the past several years, the Court has developed an increasingly broad understanding of the right to life.

87. *See id.* at ¶¶ 101-11 (addressing this issue in the Spanish original, *La especial atención a las personas que sufren de discapacidades mentales en razón de su particular vulnerabilidad*).

88. *See* Melish, *Rethinking*, *supra* note 1, at 317-20.

89. We would support such an overhaul, if its objective were to enhance access to the system.

Whatever this may imply for the viability of Melish's four quadrant scheme, as a practitioner one must at some point accept the Court's jurisprudence and apply it to advance the interests of the individuals or groups whose interests one represents.

Prior to our article, the Court had already established promising lines of argument in this regard that we cited as potential areas for petitioners to utilize. In the past two years, the Court has gone further in expanding its right-to-life jurisprudence. In the *Sawhoyamaxa* case,[90] the Court found the state of Paraguay responsible for the death of eighteen indigenous children due to the state's failure to provide adequate conditions to ensure their well being.

Rather than embrace such developments as providing additional protection to the excluded in the Americas, Melish derides the Court for expanding the right to life and warns of "dire" consequences should that body fail to apply her four quadrant theory to limit its jurisdiction. As she writes: "Article 4 of the Convention has already, in fact, been interpreted by the Court to encompass, in some way, virtually all economic, social, and cultural rights. . . . The Court has to date enunciated no limiting principle for article 4's normative expanse."[91]

While the Court has not enunciated principles in the language of Melish's proposed four quadrant scheme, in the *Sawhoyamaxa* case it did establish standards to be applied to limit state responsibility for violations of the right to life. The Court held Paraguay liable only for the deaths that occurred after the state had been put on notice in very clear terms about the imminent risk to the lives of community members. As the Court wrote, in defining the basis for state responsibility:

> In order for this positive obligation to arise, it must be established that at the time of the facts the authorities knew or should have known of a situation of real and immediate risk to the life of a specific individual or group of individuals and that they did not take the measures necessary within the scope of their attribu-

90. Sawhoyamaxa Indigenous Community v. Paraguay Case, Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29, 2006).

91. Melish, *Rethinking*, *supra* note 1, at 326.

> tions that, judged reasonably, could be expected to prevent or avoid this risk.[92]

Contrary to Melish's assertions, then, the standard elaborated by the Court establishes clear limits on the scope of state liability under article 4. First, the risk must be "real and immediate." Second, the authorities must have real or constructive knowledge. Third, the state authorities must fail to take measures to address the risk. Fourth, these measures must be within the attributions of authorities, and fifth, they must be judged necessary to prevent or avoid the risk. In addition, the measures to be taken are subject to a criterion of reasonability. This test provides ample room for American states to limit liability for deaths within their territory. Indeed, notwithstanding its use of terms distinct from those chosen by Melish, much of the Court's reasoning squares with the principles underlying justiciability as she understands the term. Thus, for example, the Court establishes in the passage from *Sawhoyamaxa* above that it will focus on instances involving "a specific individual or group of individuals," as opposed to national communities. This approach is consistent with Melish's focus on instances that involve identifiable individuals, rather than classes of victims. The Court's language on necessary measures and reasonability are, in effect, assessments of conduct, as opposed to results, in Melish's terms. It appears, then, that Melish would be well served to reassess her critique of the Court's evolving jurisprudence regarding the right to life.

Moreover, the advocacy value of a claim involving the right to life goes to the core of what gives an issue salience for media campaigns, grassroots organizing, and networking with civil society. Violations of the right to life—whether in the context of urban police killings, prison revolts, conflicts over land, failure to treat HIV patients, or failure to prevent precarious housing from flooding[93]—tend to carry more weight

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92. *Sawhoyamaxa* case, *supra* note 89, at ¶ 155 (The original Spanish reads: *Para que surja esta obligación positiva, debe establecerse que al momento de los hechos las autoridades sabían o debían saber de la existencia de una situación de riesgo real e inmediato para la vida de un individuo o grupo de individuos determinados, y no tomaron las medidas necesarias dentro del ámbito de sus atribuciones que, juzgadas razonablemente, podían esperarse para prevenir o evitar ese riesgo.*).

93. See, in this regard, our discussion of the right to housing in the hypothetical cases section, Cavallaro & Schaffer, *supra* note 2, at 279-80.

than violations that do not threaten life. When we wrote that working with advocacy groups (social movements, NGOs, etc.) and taking one's cues from them as a litigator has consequences for litigation strategy, this is part of what we meant. For example, if one is listening to these groups, one will hear a preference for focusing on those who have died in their struggles, rather than all those who, on a daily basis, suffer other rights abuses. Not surprisingly, social movements tend to value quite highly the sacrifices made by their members whose lives are lost in the course of their struggles for social justice. Recognizing this—rather than fighting against it—makes good sense from the perspective of a legal practitioner focused on social justice rather than jurisprudential development. The key, as we explain in our initial piece, is to find ways to use this right-to-life focus to advance other aspects of social justice campaigns—including ESC rights.

VII. Moving Forward

In thinking about future avenues of litigation in the inter-American system, we draw on the areas that we cited in the initial *Less as More* piece. In that article, we called on practitioners to employ gradual, evolutionary interpretations of human rights. We urged them to use what we term the "elements" approach, that is, expansive construction of civil and political rights to embrace economic, social, or cultural rights elements; to frame cases as instances of discrimination, in violation of the non-discrimination principle; to file petitions that involve violations of both civil and political and ESC rights in order to ensure access; and to make use of articles 8(a) and 13 of the San Salvador Protocol (which protect labor association and education). Most importantly, we urged them then, as we do now, to work closely with social movements, organized civil society groups, and the media to avoid attempts to combat social injustice by isolated supranational litigation. We continue to advocate these strategies.

Our article does not consider future development of ESC litigation before other supranational bodies, nor does it consider broad reform of the inter-American system. Melish's article clearly seeks to outline approaches for other supranational judicial fora. Her model strikes us as thoughtful and worthy of consideration, particularly, as she notes, in the process of ne-

gotiation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (to establish an individual complaints mechanism) and the drafting of a new International Convention on the Rights of Persons with Disabilities.[94] Were the inter-American system to modify its current treaty law on ESC rights, her approach would be worthy of consideration in that context as well. In the short term, practitioners should work with the system that exists. In that regard, our arguments about deploying the inter-American system, about listening to and working with social movements and civil society, and about the role of litigation in the inter-American system in light of all its current limitations are not fundamentally challenged by Melish's piece.

94. *See* Melish, *Rethinking, supra* note 1, at 343.